

(29,028)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 478.

CHARLES G. BINDERUP, PLAINTIFF IN ERROR,

vs.

PATHE EXCHANGE, INC.; PATHE EXCHANGE, INC., OF
NEBRASKA; EXHIBITORS MUTUAL DISTRIBUTING COR-
PORATION, *ET AL.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

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^a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1921, of said Court, before the Honorable Walter H. Sanborn and the Honorable John E. Carland, Circuit Judges, and the Honorable Jacob Trieber, District Judge.

Attest:

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the ninth day of August, A. D. 1921, a transcript of record, pursuant to a writ of error directed to the District Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, and thereafter on the ninth day of November, A. D. 1921, and on the fifth day of December, A. D. 1921, respectively, additional transcripts of record, pursuant to stipulation of parties, were filed in the office of the Clerk of the United States Circuit Court of Appeals, in a certain cause wherein, Charles G. Binderup was Plaintiff in Error, and the Pathe Exchange, Inc., et al., were Defendants in Error, which said transcripts as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, *is* in the words and figures following, to-wit:

1 United States District Court, District of Nebraska, Omaha Division.

No. 850. Law.

CHARLES G. BINDERUP

VS.

PATHE EXCHANGE, INC.

Pleas Before said Court at a Term Begun and Holden in the City of Omaha Before Hon. Joseph W. Woodrough, One of the Judges of said Court.

Be it Remembered, that on the 14th day of April, A. D. 1920, a Petition was filed in my office in the above entitled action in the words and figures following, to-wit:

Complaint.

In the District Court of the United States in and for the District of Nebraska, Omaha Division.

No. 850. Law.

CHARLES G. BINDERUP, Plaintiff,

VS.

PATHE EXCHANGE, INC., PATHE EXCHANGE, INC., of Nebraska; Exhibitors Mutual Distributing Corporation, Famous Players-Lasky Corporation, Fox Film Corporation, Select Pictures Corporation, Goldwyn Pictures Corporation, First National Exhibitors Circuit, Inc., A— H. Blank, A. H. Blank, Enterprises, Vitagraph-Lubin-Selig-Essanay, Inc., W. W. Hodkinson Corporation, Metro Pictures Corporation, Universal Film Exchanges, Incorporated, Laemmle Film Service, Enterprise Distributing Corporation, Fontenelle Feature Film Company, Incorporated, Glove Film Company, Hall Mark Pictures Corporation, Omaha Film Board of Trade, Harry D. Graham, Sidney Meyer, William F. Coleman, Charles W. Taylor, James H. Calvert, Eugene N. Blazer, Samuel A. McIntyre, Edmund J. MacIvor, Charles L. Peavey, C. Earl Holah, Max Wintroub, Elmer J. Tilton, Maude E. Larson, Thomas E. De Lamey, John J. Milstein, Herbert K. Moss, Robertson-Cole Distributing Corporation, and Harry F. Lefholz, Carl E. Laemmle, Defendants.

Comes now Charles G. Binderup, the above named plaintiff, and for his cause of action against the above named defendants, avers and shows to the court:

1. That during all the times hereinafter mentioned the plaintiff was and now is a citizen and resident of the State of Nebraska, residing in the County of Kearney, in said state. That for ten years last past plaintiff has been the owner of a moving picture theatre at Minden, Nebraska, which he has operated at times personally, but for the most part has leased the theatre to others who operated it; that during the five years last past beginning in the month of May, 1915, he has been engaged in the moving picture theatre business as operator thereof at Upland, in Franklin County, Blue Hill in Webster County, Alma in Harlan County, Franklin in Franklin County, and as lessee of a moving picture theatre at Bloomington in Franklin County, all in the State of Nebraska; that during the said five years last past he was also engaged in the business of selecting and distributing to a circuit of moving picture theatres, commonly known as "The Binderup Circuit", programs consisting of moving picture films and advertising matter accompanying the same, through an agreement entered into between himself and the parties operating said moving picture theatres at the following named places, all within the State of Nebraska: Kenesaw in Adams County, Axtell

in Kearney County, Oxford, Edison, Arapahoe, Holbrook and Cambridge, all in Furnas County, Bartley in Red Willow County, Orleans in Harlan County, McCook in Red Willow County, Stamford and Beaver City in Furnas County, Bladen in Webster County, Wilsonville in Furnas County, Campbell and Hildreth in Franklin County, Wilcox in Kearney County, Ragan in Harlan County, Holstein in Adams County, Clay Center and Fairfield in Clay County, and in addition thereto he selected, distributed and supplied with programs, consisting of moving picture films and advertising matter, the houses leased or owned by himself as hereinbefore named; that his said business so established was the result of the expenditure of time and large sums of money and became and was during the years 1916, 1917, 1918, 1919, a large and constantly growing, prosperous and profitable business from which he derived a large income all as more particularly hereinafter set forth.

2. That plaintiff brings this action under the provisions of the Act of Congress of July 2nd, 1890, entitled "An Act To Protect Trade and Commerce Against Unlawful Restraints And Monopolies" and all subsequent Acts of Congress amendatory thereto; that the amount in controversy herein, exclusive of interest and costs, exceeds the sum of Three Thousand (\$3,000) Dollars.

3. That during all the times hereinafter mentioned, the defendant Pathé Exchange, Inc. was and now is a corporation organized under the laws of the State of New York, having its principal place of business as such in the City of New York in the County and State of New York; that the defendant Pathé Exchange Inc. of Nebraska was and is a corporation organized and existing under the laws of the State of Nebraska, that it was organized by the defendant Pathé Exchange, Inc. incorporated under the laws of the State of New York, or by its representatives, as its Nebraska branch and distributing agent at the City of Omaha in the State of Nebraska.

4. That during all the times hereinafter mentioned, the defendant Exhibitors Mutual Distributing Corporation, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal place of business as such in the City of New York in the County and State of New York, and had and maintained a branch office in the City of Omaha, State of Nebraska.

5. That during and since the month of October, 1919, the defendant Robertson-Cole Distributing Corporation was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, having its principal place of business as such in the City of New York, county and state of New York, that prior to the 13th day of October, 1919, the film productions of said Corporation had been handled at Omaha, Nebraska, by the defendant Exhibitors Mutual Distributing Corporation, and upon said last mentioned date, said defendant took over all film productions and business theretofore handled for it by the Exhibitors Mutual Distributing Corporation and thereafter released and distributed its own produc-

tions, and for such purpose [established] a branch office in the City of Omaha, Nebraska, taking over the branch offices and employing the branch managers of the said Exhibitors Mutual Distributing Corporation and assuming the obligations of all contracts held by patrons for the use of its productions entered into in its behalf by said Exhibitors Mutual Distributing Corporation.

4 6. That during all the times hereinafter mentioned, the defendant Famous Players-Lasky Corporation, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business as such in the City of New York in the County and State of New York, and had and maintained a branch office in the City of Omaha, State of Nebraska.

7. That during all the times hereinafter mentioned, the defendant Select Pictures Corporation, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal place of business as such in the City of New York, State and County of New York, and had and maintained a branch office in the City of Omaha, State of Nebraska.

8. That during all the times hereinafter mentioned, the defendant Goldwyn Pictures Corporation, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business as such in the City of New York, County and State of New York, and had and maintained a branch office in the City of Omaha, State of Nebraska.

9. That during all the time hereinafter mentioned, the defendant Fox Film Corporation, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in the City of New York, County and State of New York, and had and maintained a branch office in the City of Omaha, State of Nebraska.

10. That during all the times hereinafter mentioned, the defendant First National Exhibitors Circuit, Inc. was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in the City of New York, County and State of New York; that for the purpose of distributing to its patrons its films, pictures and productions, said defendant entered into an arrangement with one A—— H. Blank, doing business under the name and style of A. H. Blank Enterprises with offices at Omaha, Nebraska, Des Moines, Iowa and Kansas City, Missouri.

11. That during all the times hereinafter mentioned, the defendant A. —— H. Blank, doing business under the name and style of A. H. Blank Enterprises, was and now is engaged in the moving picture theatre business and as distributors of films and pictures for the defendant First National Exhibitors Circuit and for such purpose had and maintained offices in the City of Omaha, State of Nebraska, City of Des Moines, State of Iowa, and Kansas

City in the State of Missouri, through which said offices it distributed to its patrons, its films, pictures and products of the First National Exhibitors Circuit.

12. That during all the times hereinafter mentioned, the defendant Vitagraph-Lubin-Selig-Essanay, Inc. was and is now a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in the City of New York, in the County and State of New York, and had and maintained a branch office in the City of Omaha, State of Nebraska.

13. That during all the times hereinafter mentioned, the defendant W. W. Hodkinson Corporation was and now is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal place of business in the City of New York, County and State of New York, and had and maintained a branch office in the City of Omaha, State of Nebraska.

14. That during all the times hereinafter mentioned, the defendant Metro Pictures Corporation was and now is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal place of business in the City of New York, County and State of New York, and had and maintained a branch office in the City of Omaha, State of Nebraska.

15. That during all the times hereinafter mentioned, the defendant Universal Film Exchanges, Incorporated, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business as such in the City of New York, County and State of New York, and had and maintained a branch office in the City of Omaha, State of Nebraska.

16. That during all the times hereinafter mentioned, the defendant the Laemmle Film Service, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in the City of New York, County and State of New York, and had and maintained a branch office in the City of Omaha, State of Nebraska.

17. That during all the times hereinafter mentioned, the defendant Carl E. Laemmle, doing business under the name and style of the Laemmle Film Service, was and now is engaged in the business of producing and distributing films, pictures and kindred products throughout the United States, with his principal place of business as such in the City of New York, County and State of New York, and had and maintained a branch office in the City of Omaha, Nebraska, and for the purpose of distributing his productions entered into an arrangement with the defendant Universal Film Exchanges, Incorporated, at its various branch offices and in particular at its branch office in the City of Omaha, State of Nebraska.

18. That during all the times hereinafter mentioned, the defendant, Enterprise Distributing Corporation, was and now is a non-resident corporation organized and existing under and by virtue of the

laws of the State of — and had and maintained a branch office in the City of Omaha, State of Nebraska.

19. That during all the times hereinafter mentioned, the defendant Fntenelle Feature Film Company, Incorporated, was and now is a corporation organized and existing under and by virtue of the laws of the State of Nebraska with its principal place of business as such in the City of Omaha, State of Nebraska.

20. That during all the times hereinafter mentioned, The defendant Globe Film Company was and now is a co-partnership composed of one C. O. Hawkhurst and one Henry C. Wirpel and as such engaged in the distribution of one moving picture known as "The Eyes of the World" with exclusive rights therein for the distribution thereof throughout the United States.

21. That during all the times hereinafter mentioned, the defendant Hall Mark Pictures Corporation was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business as such in the City of New York, County and State of New York, and had and maintained a branch office in the City of Omaha, State of Nebraska.

21½. That during the year 1915, and at all times since said year and for many years prior to the year 1915, all of the foregoing defendants or their predecessors, were engaged in the moving picture business either as producers and manufacturers of moving picture films, or as distributors thereof, or both, that after the work of production and manufacture of a moving picture film had been for the best part completed by the defendants, it was usually perfected, passed upon and approved by the defendants at their place of business in New York City and when so perfected and the advertising matter accompanying the same had been prepared, the defendants

7 would publicly announce to the world by an extensive system of advertising, that the picture would be released upon a certain day, meaning thereby that the same would upon said date be sent out from their said place of business in New York by express or parcel post to their various branch offices established by them in the large cities throughout the states and territories of the United States and in particular in Omaha, Nebraska, there at their branch offices and by their branch agents to be distributed to their patrons in the states of Nebraska, Iowa, and South Dakota, for use and display in various moving picture theatres.

Amendment to 21½.

"That before on and after November, 1919, the defendants named in paragraphs numbered 3 to 21 controlled the distribution of the entire production of films in the United States of America, and that no films could be procured from any other source in the United States that could be used in the theatres of the plaintiff and his circuit, and that no films have ever been produced in the State of Nebraska."

22. That during all the times hereinafter mentioned, the defendant Omaha Film Board of Trade was and now is a corporation organized and doing business under the laws of the State of Nebraska, having its principal place of business in the City of Omaha, in said state, that said Film Board of Trade was incorporated to carry out the objects and purposes set forth in their Articles of Incorporation, a copy of which is hereto attached marked Exhibit A and made a part hereof, and in the By Laws adopted by said Film Board of Trade, a copy of which [are] hereto attached, marked Exhibit B and made a part hereof.

23. That during the times hereinafter mentioned and until on or about the 13th day of November, 1919, the defendant Harry D. Graham was the branch manager at Omaha, Nebraska, of the Pathé Exchange, Inc. of New York and the Manager of the Pathé Exchange, Inc. of Nebraska, and during all the times hereinafter mentioned was one of the incorporators of and the president and presiding officer of the board of directors of the Omaha Film Board of Trade.

24. That during all the times hereinafter mentioned, the defendant Sidney Meyer, was the branch manager at Omaha, Nebraska, of the defendant Fox Film Corporation and one of the incorporators and the Secretary of the defendant Omaha Film Board of Trade.

8 25. That during all the times hereinafter mentioned, William F. Coleman was the assistant manager for the defendant A. — H. Blank, doing business under the name and style of A. H. Blank Enterprises, and was the assistant secretary of the defendant Omaha Film Board of Trade.

26. That during all the times hereinafter mentioned, the defendant Charles W. Taylor, was the branch manager at Omaha, of defendant Select Pictures Corporation and the vice president of the defendant Omaha Film Board of Trade.

27. That during all the times hereinafter mentioned, the defendant James H. Calvert, was the branch manager of the defendant Universal Film Exchanges, Incorporated, at Omaha, Nebraska, and was branch manager at Omaha, Nebraska, of the Laemmle Film Service and one of the directors of defendant Omaha Film Board of Trade.

28. That during all the times hereinafter mentioned the defendant Eugene N. Blazer was a member of the board of directors of the Omaha Film Board of Trade and counsel and attorney for the defendant Omaha Film Board of Trade.

29. That during all the times hereinafter mentioned the defendant Samuel A. McIntyre was the branch manager at Omaha, Nebraska, of the defendant Metro Pictures Corporation of New York and a member of the board of directors of the Omaha Film Board of Trade.

30. That during all the times hereinafter mentioned, the defendant Edmund J. MacIvor was the branch manager at Omaha, Nebraska of the defendant Goldwyn Pictures Corporation of New York and a director of the defendant Omaha Film Board of Trade.

31. That during all the times hereinafter mentioned, and until on or about the 15th day of February, the defendant Charles L. Peavey, was the branch manager at Omaha, Nebraska, of the defendant Famous Players-Laskey Corporation of New York City and since last mentioned date has become and now is the branch manager at Omaha Nebraska, of the defendant Robertson-Cole Distributing Corporation and a director of the defendant Omaha Film Board of Trade.

32. That during all the times hereinafter mentioned, the defendant C. Earl Holah was manager at Omaha, Nebraska, of the defendant A. — H. Blank, doing business under the name and style of A. H. Blank Enterprise and as such was the branch
9 manager of the First National Exhibitors' Circuit, a corporation of New York and a member of the board of directors of the Omaha Film Board of Trade

33. That during all the times hereinafter mentioned, the defendant Max Wintroub was the manager at Omaha, Nebraska, of the defendant Fontenelle Feature Film Company of Nebraska, a corporation, and a member of the board of directors of the Omaha Film Board of Trade.

34. That during all the times hereinafter mentioned, the defendant Elmer J. Tilton was the branch manager at Omaha, Nebraska, of the Defendant Exhibitors' Mutual Distributing Corporation of New York up to the 13th day of October 1919, on or about which date he was succeeded as such branch manager by the defendant Maude E. Larson.

35. That during all the times hereinafter mentioned, the defendant Thomas E. De Laney was the branch manager at Omaha, Nebraska, of the defendant Vitagraph-Lubin-Selig-Essansy, Inc. of New York, and a member of the board of directors of the Omaha Film Board of Trade.

36. That during all the times hereinafter mentioned, the defendant John J. Milstein was the branch manager at Omaha, Nebraska, of the defendant W. W. Hodkinson Company of New York until on or about the 13th day of October, 1919.

37. That during all the times hereinafter mentioned, the defendant Herbert K. Moss was the branch manager at Omaha, Nebraska, of the defendant Enterprise Distributing Corporation of New York until the month of November, 1919, when he became the branch manager of Omaha, Nebraska of the W. W. Hodkinson Corporation.

38. That during all the times hereinafter mentioned, the defendant Harry F. Lefholz was the assistant manager of the defendant

Universal Film Exchanges and of the Laemmle Film Service, Inc. and was a member of the defendant Omaha Film Board of Trade.

39. That during all the times hereinafter mentioned, the defendant Maude E. Larson was the branch manager at Omaha, Nebraska, of the defendant Hall Mark Pictures Corporation.

40. That during all the times hereinafter mentioned, the defendants Exhibitors' Mutual Distributing Corporation, Robertson-Cole Distributing Corporation of New York, W. W. Hodkinson Corporation and the Hall Mark Pictures Corporation and the defendants Maude E. Larson, Edmund J. Tilton and John J. Milstein while not actually members of the Omaha [Bilm] Board of Trade were affiliated and acting with, and working in conjunction with and in sympathy with defendant Omaha Film Board of Trade.

Paragraph 40½.

"That for a long period prior to the 13th day of November, 1919, and during all of the times alleged in this petition, the United States was by the defendants named in paragraphs 3 to 21 both inclusive respectively divided into zones or districts for the distribution of films from some therein centrally located points, of which the Omaha zones were comprised of parts of the States of Nebraska, Iowa and South Dakota, and the theatres herein referred to as owned and served by Binderup were all located within all of the zones of said respective defendants served from Omaha, that films of said defendants could only be obtained from the centrally designated point within such zone, and the purchase of films could not be had from any of the defendants without their respective zones in which the exhibitor lived and this plaintiff could procure no service from any point other than Omaha.

41. That in carrying on his business as hereinbefore alleged it was necessary for the plaintiff to procure, by paying the price therefor, and transmission charges thereon from many of the defendants above named moving picture films and advertising matter through their branch offices and agents at Omaha, Nebraska, and it frequently became necessary in order to supply the demands of the plaintiff in that regard for the said defendants to procure at points outside of the State of Nebraska, moving picture films and the necessary advertising matter to accompany the same, constituting the program which plaintiff desired to exhibit at some or all of his moving picture theatres, which films and advertising matter were in due season forwarded to him by express or parcel post; that his business was constantly growing and became large in volume, necessitating his entire time and attention and the expenditure of large sums of money and as result his business became, and was during all the times hereinafter mentioned, highly profitable and successful and by reason of such fact, the cupidity and jealousy of the defendants Universal Film Exchanges, the Laemmle Film Service, James H. Calvert and Harry F. Lefholz were excited and during the month

of February, 1918, the said defendant, Harry F. Lefholz called upon the plaintiff at Minden, Nebraska, representing that he had called at the request of the New York manager and was speaking for the defendants last named and demanded that he give them a considerable share of his patronage and upon plaintiff declining so
 11 to do, then and there threatened the plaintiff that the said defendants last named would put him out of business and "would bust him up in business" by starting an exchange at Holdrege, Nebraska, and supply by underbidding all of the theatres of which plaintiff's said circuit was composed and depriving him of the business thereof; and that thereafter, the said defendants did establish such exchange and did attempt and endeavor to put this plaintiff out of business by offering to supply the theatres on said circuit, picture film at a discount.

42. That during the month of April, 1919, all of the defendants named, except those mentioned in paragraph 40, for the purpose of enabling them to control the prices and dictating the terms upon which they would transact business with their patrons, operating theatres throughout the states of Nebraska, Iowa, and South Dakota, and in order to enforce their claims, demands and decisions as to business conditions and terms upon their said patrons, caused to be organized at Omaha, Nebraska, the Defendant Omaha Film Board of Trade which was incorporated during said month of April, 1919, under the laws of the State of Nebraska. The plan of operation of said corporation, being as stated in their said Articles, a copy of which is attached hereto marked Exhibit A and made a part hereof, shall be to have it composed of those persons or corporations engaged in the film business particularly motion picture film distributing companies, corporations or individuals, engaged in that business, represented by the managers or one of the executive heads of said companies; one share of stock to be issued to the manager of each of said companies or to such individual to entitle them to membership therein. Such stock to be non-assessible and non-transferable except to such corporations and individuals as may have been approved of by the membership of said Film Board of Trade and it may prescribe and collect dues, assessments and fines.

(Amendment.)

42½. That defendants named in paragraphs three (3) to twenty-one (21) both inclusive did in leasing for exhibition their films from their New York offices through their branch offices in Omaha enter into written and oral contracts with the plaintiff the terms and conditions of which were substantially as set out in Exhibits A, B, and C hereto attached and made part hereof; that the title control, and right to recall said films at all times was retained by the home offices at New York of said defendants.

12 43. That during the early part of the year 1919, plaintiff's business had grown to such large proportions and become so successful and profitable, which fact became known to all defendants

herein named; that during said year and prior to the month of September, 1919, plaintiff was procuring for use in his said picture houses and upon his said circuit, programs from the defendants, Pathé Exchange Inc. of New York, Pathé Exchange, Inc. of Nebraska, First National Exhibitors Circuit of New York, and A. H. Blank Enterprises of Omaha, Nebraska, Des Moines, Iowa, and Kansas City, Missouri, and Famous Players-Lasky Corporation of New York, all of whom were members of the Omaha Film Board of Trade; that he was frequently solicited by representatives of other defendants, who were also members of said Film Board of Trade, for a share of his business, and because of his failure to deal with said other defendants, a spirit of hostility was aroused upon their part toward this plaintiff, and great pressure was brought to bear by them upon those defendants with whom said plaintiff was dealing as aforesaid, to compel them to cease doing business with the said plaintiff.

44. That thereupon and during the month of August, 1919, and at all times since and until the date of the filing of this complaint, all of the above named defendants wrongfully, unlawfully and contrary to the Act of Congress in such case made and provided, combined, confederated and conspired in restraint of trade and commerce among the several states, with the purpose and intent of preventing plaintiff from carrying on his said business and from continuing therein, and with the intent and purpose to ruin plaintiff in his business and his credit and reputation.

First Amendment.

"and with the intent and purpose of monopolizing or attempting to monopolize and for the purpose of acquiring the power to monopolize the business of distribution and lease or sale within the territory comprised in this zone of picture film programs."

Second Amendment (in Lieu of First Amendment).

"and of eliminating the competition of plaintiff and of acquiring the business and profits of plaintiff for themselves, and with the intent and purpose of monopolizing or attempting to monopolize and for the purpose of acquiring the power to monopolize the business of distribution and lease or sale within the territory comprised in this zone of picture film programs by means of the system of zones described in other parts of this petition together with the Omaha Film Board of Trade which combined all of the distributors in the zone within which plaintiff had been placed by defendants, as more fully described in other parts of this petition, which acts had the effect of, and tended to monopolize the business of distribution within this zone, and placed it within the power of defendants to monopolize the moving picture industry in this zone."

and in furtherance of said conspiracy and to accomplish their ends in that regard, the defendants who were members of the defendant Omaha Film Board of Trade caused false charges to be made against

the said plaintiff and brought before the members of the said Film Board of Trade and without the knowledge of this plaintiff and without giving him an opportunity to be heard, he was placed upon the so-called black list or blue list of the defendant Omaha Film Board of Trade; that thereupon the proper officers of said Omaha Film Board of Trade caused notice of said action in placing plaintiff upon said blue or black list to be given to each and every member of said Film Board of Trade by mailing or delivering to each a blue card upon which appeared the name of this plaintiff. Whereupon, each and every one of the defendants who were members of said Omaha Film Board of Trade, or affiliated therewith, at once ceased to and refused to transact any further business with the plaintiff or to render him any further service or to deliver to him programs, moving picture films and advertising matter, for use in his business notwithstanding he had unfilled contracts fully paid for, and in force, requiring such service and the delivery of such programs, moving picture films and advertising matter, from the defendants, Pathé Exchange, Inc. of New York, Pathé Exchange, Inc. of Nebraska, A. H. Blank Enterprises and Famous Players-Lasky Corporation and Exhibitors Mutual Distributing Corporation;

Amendment to Paragraph 44 at line 22 of Page 14 of the Bill.

"And thereafter continued to and have ever since refused to lease to the plaintiff films for his own and other theatres in said circuit."

that these defendants herein who were not members of the said Omaha Film Board of Trade became advised of the action of the said Film Board of Trade and co-operated with and approved the action of said Board and entered into and became a part of the said conspiracy against this plaintiff to ruin his business and his credit and reputation; that thereafter, the defendants through their
 14 agents and branch offices at Omaha, Nebraska, cause notices to be sent to the persons operating the various moving picture theatres comprising the Binderup Circuit as aforesaid advising them that on and after the 15th day of September, 1919, it would be necessary for them to order their programs and service direct from the Omaha Exchanges because all the Exchanges had decided to discontinue supplying the Binderup Circuit with any programs, films, advertising matter or service; that thereupon the various defendants named caused their representatives to call upon the persons operating the picture theatres comprising the so-called Binderup Circuit and the theatres owned or leased by this plaintiff at Franklin, Bloomington, Upland, Blue Hill and Alma, that later-on plaintiff was personally notified that defendants would refuse to furnish him with programs or service at his own theatre at Minden.

45. That on or about the 1st day of September, 1919, as plaintiff is informed and believes, he was by the action of the Omaha Film Board of Trade removed from the so-called black list or blue list, and as a result of such action, various representatives, with whom

he had had no business dealings in 1919, called upon him at Minden, Nebraska, and solicited his business for the supplying of film service and programs at the various moving picture houses operated by him and by the theatres operated on the so-called Binderup Circuit, but plaintiff declined to intertain their business proposition in that regard; that, thereafter, and on or about the 10th day of November, 1919, in furtherance of the said conspiracy, and for the purpose of carrying out the intent and purpose and object thereof to ruin this plaintiff in his credit and reputation and destroy his business, the said defendants conspired, confederated and combined, and caused further charges to be made against the said plaintiff before the Omaha Film Board of Trade and plaintiff, without notice or knowledge upon his part and without being given an opportunity to be heard, was again placed upon the so-called black list, or blue list, by the members of the Omaha Film Board of Trade and immediately thereafter received notice from the defendants with whom he was dealing that they declined to make shipment of programs or give him further service. Thereupon plaintiff came to Omaha, Nebraska, to ascertain what the trouble was and then and there became advised of the action of the defendants, through the defendant Omaha Film Board of Trade, in placing him upon the so-called black list or blue list of the said Omaha Film Board of Trade. He called upon the several defendants with whom he was carrying on business at the time, requesting to be given service and to be shipped programs, all of which requests were denied, and he was advised that no further service and no further programs would be shipped until his name had been removed from the blue list or black list by the members of the Omaha Film Board of Trade, or by the Grievance Committee thereof; that thereupon some of the defendants caused the Grievance Committee to be called together, which committee met at the office of the defendant Eugene Blazer, in the City of Omaha, State of Nebraska, and in the presence of this plaintiff; that the said Committee were unable to reach any conclusion and declined to take any action with regard to the matter and suggested that the matter be referred to the entire board for disposition; that thereupon, and upon the same day, defendant Blazer, attorney for the said Omaha Film Board of Trade, called a meeting of the members of the Said Film Board of Trade to be held at his office, and a meeting thereof was held at said office on the afternoon of said day, to wit the 13th day of November 1919; that at said meeting there were present the following named defendants: Harry D. Graham, Sidney Meyer, James H. Calvert, Samuel A. MacIntyre, Edmund L. MacIvor, Eugene M. Blazer, William F. Coleman and Maude E. Larson; that after discussion motion was made and unanimously adopted as follows: That Mr. Binderup be kept on the blue list indefinitely, and that he be not supplied with any service whatsoever as far as bookings for any house that does not actually and wholly belong to him outright, and in reference to the houses that he claims belongs to himself, that he sign affidavit showing what ownership he has in each house, and further that he be not supplied with any films whatsoever for his own use until he has deposited

one thousand dollars in some bank or trust company, subject to forfeit and check by the Omaha Film Board of Trade, if, at any time, he shall violate any of the rules of this association. That thereupon in the presence of the said board, this plaintiff protested against and objected to such action being had as illegal, and unlawful and plaintiff declined to make the deposit of one thousand dollars, required of him and denied that there was any good reason, or ground for such action of the members of the Omaha Film Board of Trade, and requested that he be allowed to see and be informed of the charges against him and an opportunity to be heard in respect thereto, and such charges as were referred to in the discussion by the members in his presence this plaintiff absolutely denied and refuted by the evidence of members present who knew the truth with respect thereto. That thereafter, and ever since, in furtherance of said conspiracy, the defendants and each of them, have wrongfully,

16 unlawfully and contrary to the Act of Congress herein before referred to refused to have any dealings with this plaintiff and to furnish him with film service and programs and have caused unexpired contracts which he held with some of the defendants entitling him to such programs and service to be illegally and unlawfully cancelled and he ever since has been and is now deprived of such service and programs. That these defendants mentioned in paragraph 40 hereof who were not members of the Omaha Film Board of Trade, with one of whom, to-wit the Exhibitors Mutual Distributing Corporation there was a contract for service fully paid for by this plaintiff, likewise acting in sympathy and conjunction with the members of the said Omaha Film Board of Trade, refused to furnish plaintiff with service and programs at the picture theatres upon his said circuit.

46. This plaintiff further alleges that as a part of the conspiracy charged to ruin the plaintiff's business and to ruin his credit and reputation, the defendant Globe Film Company during the month of September, 1919, made representations to the various members of the Binderup Circuit and to operators of moving picture theatres owned by plaintiff, that any service he would receive or be furnished in the way of moving picture programs, would be of an inferior character and poor in quality, and that it was their intention to start new and independent theatres in all good towns in which plaintiff controlled moving picture theatres, and in particular in his home town of Minden, Nebraska, and further represented that Film Exchanges at Omaha had or would decline to give plaintiff anything in films.

47. That by reason of said combination and conspiracy and the illegal acts of the defendants above named, the plaintiff, ever since the 13th day of November, 1919, has been utterly unable to secure film service, programs and advertising matter for his various theatres hereinbefore referred to and has thereby been prevented from carrying on his business in all of the moving picture theatres hereinbefore mentioned and of supplying his patrons at the theatres

named as comprising the Binderup Circuit; that as a result his said business has been totally destroyed and he has been unable to lease to advantage, picture theatres owned by him, and those theatres leased by him hereinbefore mentioned, he has been unable to operate to advantage and many of them are closed and has been put out of use, all as more particularly hereinafter alleged and he has wholly lost the profits which would otherwise have accrued to him, all to his great loss and damage.

17 48. Plaintiff further alleges that by reason of the said illegal conspiracy and acts of the defendants as above set forth, plaintiff has been deprived of patronage, since the 13th day of November, 1919, of all of the operators of the theatres comprising the Binderup Circuit and from supplying them with programs, films and advertising matter and that he has wholly lost the profits which would otherwise have accrued to him therefrom all to his great loss and damage.

49. Plaintiff further alleges that by reason of said combination and conspiracy and the illegal acts of the defendants above set forth, the plaintiff has been put to great expense and loss of time in the effort to adjust his said business and in caring for his property interests so as aforesaid made comparatively useless for the purposes for which they were designed and also has been put to great expense in the employment of counsel.

50. That in consequence of the wrongful acts and of the unlawful combination and conspiracy of the defendants above set forth, the plaintiff has suffered loss and damage in the following particulars, to-wit:

That by reason of plaintiff being compelled by the unlawful acts as aforesaid to close his theatre at Minden, Nebraska, he has been deprived of the rental of his moving picture theatre ever since the 13th day of November, 1919, amounting to this date to the sum of \$600 or thereabouts, and the value of his property has been depreciated to the extent of \$6,000;

That in being compelled by the unlawful acts as aforesaid to close his theatre and being deprived of the opportunity to operate the same at Alma, Nebraska, upon which plaintiff had a five year lease which he was compelled to sell at an actual loss to him in the sum of three thousand (\$3,000) dollars;

That being so compelled to close his theatre and being deprived of the opportunity to operate the same at Blue Hill, Nebraska, upon which he had a five year lease and which he was compelled to close, resulted in a loss to him in the sum of three thousand (\$3,000) dollars and from which he has received no revenue whatever;

That in being compelled by the unlawful acts as aforesaid to close his theatre and being deprived of the opportunity to operate the same at Upland, Nebraska, upon which he held a five year lease which he was compelled to dispose of at a great loss to him in the sum of three thousand (\$3,000) dollars;

18 That being compelled by the unlawful acts of defendants as aforesaid to close his theatre and being deprived of the opportunity to operate the same at Bloomington, Nebraska, upon which he held a five year lease which he was compelled to close, resulted in a loss to him in the sum of three thousand (\$3,000) dollars.

That being compelled by the unlawful acts of the defendants as aforesaid plaintiff was compelled to close the theatre which he owned and operated at Franklin, Nebraska, which as a going concern prior to the illegal acts of the defendants, was worth to plaintiff the sum of \$12,500, but which by reason of the unlawful acts and his being deprived of the use of the theatre which has been since closed, has depreciated to the value of \$5,000 resulting in a loss to this plaintiff in the sum of Seven thousand five hundred (\$7,500) dollars;

That during the year 1919 and up to the 13th day of November, 1919, plaintiff was in the receipt of a net income from the operation of all the theatres aforesaid owned by him and leased by him and from the theatres to which he furnished and distributed the films, known and constituting the well-known Binderup Circuit, in the sum of Thirteen thousand five hundred fifty-one (\$13,551) dollars; that all of said concerns were going concerns and in full operation as such at the time of the unlawful acts and combination and conspiracy of the defendants hereinbefore alleged, and by reason thereof this plaintiff was further deprived of the profits which were steadily increasing from year to year and for the term of ten years would have been of the value to the plaintiff in the sum of two hundred thousand (\$200,000) dollars;

Plaintiff further alleges that by reason of said unlawful acts of defendant he has incurred and will be compelled to incur expenses in the sum of one thousand (\$1,000) dollars.

That in all plaintiff has been damaged, as a result of the unlawful combination and conspiracy and illegal acts of the defendants in the sum of Two hundred forty thousand fifty-one (\$240,051) Dollars, no part of which has been paid.

Wherefore Plaintiff claims judgment against the defendants for damages, by virtue of the Act of Congress in such case made and provided, in the sum of Seven hundred twenty thousand one hundred fifty-three (\$720,153) Dollars the same being three fold the

19 actual damage by him sustained, together with the costs of suit and reasonable attorney fees.

C. P. ANDERBERY AND BROWN,
BAXTER & VAN DUSEN,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
State and District of Nebraska,
Omaha Division, ss:

Charles G. Binderup, of Minden, in the County of Kearney, State of Nebraska, being first duly sworn, deposes and says that he is the plaintiff in the above entitled cause; that he has read the foregoing complaint and knows the contents thereof and the same are true he verily believes.

CHARLES G. BINDERUP.

Subscribed in my presence and sworn to before me this 14th day of April, 1920.

[SEAL.]

ANNA L. HOWLAND,
Notary Public.

Endorsed: Filed Apr. 14, 1920, R. C. Hoyt, Clerk.

(Answer of the Defendant Metro Pictures Corporation.)

(Filed in the U. S. District Court on March 28, 1921.)

Comes now the defendant, Metro Pictures Corporation and for its separate answer to the alleged cause of action set forth in the petition herein:[:]

1. Denies that it has any knowledge or information sufficient to form a belief as to any of the matters alleged in the paragraphs of the petition marked and numbered, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 21½, except as hereinafter specifically admitted, and all such matters are therefore denied.

2. This defendant admits all of the allegations of paragraph 22 of the petition except the statement contained therein that said Board was "doing business" within the State of Nebraska which allegation this defendant denies.

3. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the matters alleged in the paragraphs of the petition marked and numbered 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, except as hereinafter specifically admitted and all such matters are therefore denied.

4. On information and belief denies each and every allegation contained in the paragraph of the petition marked and numbered 41.

5. Denies each and every allegation contained in the paragraph of the petition marked and numbered 42, except as hereinafter specifically admitted.

6. Denies any knowledge or information sufficient to form a belief as to the truth of any of the matters alleged in the paragraph of the petition marked and numbered 43.

7. Denies each and every allegation contained in the paragraphs of the petition marked and numbered 44, 45, 46, 47, 48, 49, 50, except as hereinafter specifically admitted.

8. This defendant admits that defendant Pathé Exchange, Inc., was at the times mentioned in the petition a corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Harry D. Graham was branch manager, from about Feb. 11 1919 to the present time.

9. This defendant admits that Famous Players-Lasky Corporation was at the times mentioned in the petition a corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Charles L. Peavey was branch manager from about March, 1919, until about February 10, 1920.

10. This defendant admits that Select Pictures Corporation was at the times mentioned in the petition a corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Charles W. Taylor was branch manager from about October 8, 1917, to the present time.

11. This defendant admits that Fox Film Corporation was at the times mentioned in the petition a corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Sidney Meyer was branch manager from April 19, 1918, to the present time.

21 12. This defendant admits that A. H. Blank, doing business under the name of the A. H. Blank Enterprises, maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant C. Earl Holah was branch manager from June 15, 1918 to May 7, 1920.

13. This defendant admits that Vitagraph, Inc., erroneously sued herein as Vitagraph-Lubin-Selig-Essanay, Inc., was at the times mentioned in the petition a corporation organized under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Thomas E. Delaney was branch manager from November 17, 1919, to the present time.

14. This defendant admits that Universal Film Exchanges, Inc., was at the times mentioned in the petition a corporation organized under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which James H. Calvert was branch manager from December 29, 1918 to January 31, 1920 and the defendant Harry F. Lefholz was branch manager from February 1, 1920 to the present time.

15. This defendant admits that Enterprise Distributing Corporation was at the times mentioned in the petition a corporation organized under the laws of the State of — and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Herbert K. Moss was branch manager from Oct. 10, 1919 to February 5, 1920.

16. This defendant admits that Fontenelle Feature Film Company was at the times mentioned in the petition a corporation organized under the laws of the State of Nebraska and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the de-

defendant Max Wintraub was president and general manager from May 1, 1917 to the present time.

17. This defendant admits that Hallmark Pictures Corporation was at the times mentioned in the petition a corporation organized under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Maude E. Larson was branch manager from December 1, 1919, to about December 8, 1919.

For a complete defense to each and all of the matters set forth in the plaintiff's petition this defendant alleges:

18. Between the years 1915 and 1920, the motion picture industry in the United States of America was and still is composed of three primary branches, each conducted by those known respectively as (a) producers, (b) distributors, also known as exchangemen, and (c) exhibitors.

(a) At all such times there were within the United States, and still are a large number of producers, entirely disassociated with any of the defendants named herein producing large quantities of desirable motion pictures all of which are available to exhibitors within the State of Nebraska. The producers of motion pictures conduct their business by acquiring the exclusive motion picture rights throughout this country and generally throughout the world in and to literary and dramatic subjects, most of which subjects are duly copyrighted in this country, and after the subject to be pictured has been reduced to scenario form, and the cast of players who are to enact various parts therein have been selected, the work of taking the pictures in the studios and elsewhere begins, and when completed the various scenes thus photographed are assembled in continuity so as to display in picture form the story of the subject so pictured.

After the negative motion picture is completed and duly assembled and titled, from forty to one hundred copies thereof are printed on positive films and wound upon reels made for that purpose, in lengths of approximately one thousand feet each. These copies are variously known as positive prints, positives, copies and prints.

Thereupon, two prints of each subject are duly entered in the office of the Registrar of Copyrights in Washington, District of Columbia, for copyright, and copyright throughout the United States is thereupon granted thereon.

(b) For the purpose of distributing the prints of such motion pictures to and causing them to be exhibited by exhibitors, the country is divided by most of the distributors, into approximately twenty or more territorial districts or zones, not always embracing the same identical territory, but generally embracing substantially the same, and in each zone or district those engaged in the business of distributing and renting motion pictures to exhibitors therein, maintain an office commonly known as an exchange, within a city commonly used by those engaged in such business, as the film centre from which to distribute said films throughout such zone or

district. Some of the corporate defendants herein maintain what is known as a national organization for the distribution of pictures, controlled exclusively by them, and maintain an exchange in each one of the film centres in each, of the twenty zones or districts described above, while each film centre also contains one or more

23 local exchanges, sometimes called independent exchanges, the business of which is generally confined to the particular zone or district in which the city which constitutes the film centre for that locality is situated, or to the territory adjacent thereto.

The State of Nebraska is within a zone or territory generally served with motion pictures from the City of Omaha, which is the film centre of the State.

The whole territory, so served generally, includes part of the State of Iowa, part of the State of South Dakota, and the major part of the State of Nebraska, but the primary part of the territory is that within the State of Nebraska and the portion of the territory outside of the State is regarded as only incidental to the territory within said State. Said territory is also frequently and conveniently served from the cities of Kansas City, Missouri, Minneapolis, Minnesota, and Denver, Colorado.

The zone or territory of which the State of Nebraska is a part is known in the motion picture industry as a two per cent territory, which means that only two per cent of the rental received from the exhibition of a picture within the United States, is derived from such zone or territory.

The invariable practice of the corporate defendants maintaining an exchange in the City of Omaha, is to deliver to such exchange from one or more points beyond the State of Nebraska, generally from two to five prints of each motion picture subject, which prints are from the date of delivery thereof at Omaha, ready to be rented to exhibitors within said State and the said prints so delivered to the exchanges at Omaha, then become and thereafter remain in consumption and mingled as much as from their nature they can be, with other property of the State and are used for repeated exhibitions therein, until the said prints are physically exhausted and of no further use for exhibition purposes.

The distributors of motion pictures acquire from the owners of the pictures, and from the owners of the United States copyright thereon, by contract, the exclusive right and authority for a specified time and within a specified territory, to distribute and to rent to motion picture exhibitors within such territory and not elsewhere, the positive prints entrusted to said distributor, and pursuant to such authority, and in the exercise of such exclusive right and privilege, which is of great value to the distributor, the distributor enters into a large number of contracts with the individual motion picture exhibitors within

each zone or district as described above, for the exhibition
24 therein of the pictures controlled by such distributor. These contracts, individually involve comparatively small rentals, ranging in the country and outlying districts in the State of Nebraska in amounts from \$1.50 to \$7.50 per reel, for the exclusive privilege

of exhibiting at a specified theatre for a specified day, a particular motion picture subject and immediately after the exhibition of a picture has been concluded, the duty is uniformly imposed upon the exhibitor thereof, by contract, to return the film without delay, transportation charges prepaid, to the exchange from which he received it and if he fails in this, the time, place of exhibition and the prompt redelivery of the film, being of the essence of the agreement, serious damage to the distributor generally results, since the distributor becomes unable to fill his contracts with other exhibitors for the exhibition of the same film in other parts of the state.

And the nature of the business of the distributor is such that its success is necessarily entirely dependent upon the exact and punctual performance by the exhibitor of his contract with the distributor and upon the distributor's ability to preserve inviolate the exclusive character of his right to cause the prints of each motion picture subject entrusted to his charge to be exhibited only under authority conferred by him as to the time and place of exhibition and the promiscuous and unauthorized exhibition of such prints would not only constitute an unlawful infringement of the copyright thereon but would tend to destroy the business of the distributor and render him liable to respond in damage to other exhibitors with whom he had contracted for the subsequent delivery of the same film.

(c) On information and belief during the times mentioned above, there were within the United States and still are upwards of 15,000 motion pictures theatres, about 665 of which are situated within the territory served from the City of Omaha, and about 341 of which are within that part of the State of Nebraska, which is served from said city. These theatres are owned, leased or operated by exhibitors, who are the primary consumers of the industry and who rent the films from the distributors and exhibit the pictures thereon to the public, the ultimate consumer, for an admission fee.

Each performance lasts about two hours, and during the day and evening about six performances are usually given at each theatre. Each performance consists of the exhibition of about eight reels of motion pictures, which is approximately 8,000 feet of motion picture

film, and frequently exhibitors rent from a single distributor what is sometimes described as an entire show or program, which generally consists of a drama, generally five reels in length, commonly known as a feature film, and two short subjects, one of two reels in length and one of one reel.

The rental price for such entire programs throughout the State of Nebraska ranges from \$12 to \$60, depending upon the picture which comprise any particular program, the chief elements of value being the literary or dramatic subject matter upon which the pictures are based, the popularity of the stars and actors depicted therein, the skill with which the work of production is executed, and particularly the proximity of the date of exhibition to the date upon which the picture was "released," which means the date upon which it was first available for exhibition throughout this country.

The majority of the theatres within the State of Nebraska are

small and are situated in small towns not easily accessible from the City of Omaha.

During the times heretofore stated, a large number of small motion picture theatres sprang up within the State of Nebraska, especially in the country districts, some of which were conducted by men who were inexperienced in and ignorant of the business, many of whom were men of little or no means and some of whom were entirely irresponsible and had no regard for the faithful performance of their contracts and were not entitled to be trusted with possession of valuable property, such as motion picture films.

19. As the result of these conditions in the exhibiting branch of the motion picture industry within the State of Nebraska, a great number of petty, but serious abuses were practiced continuously by the small and irresponsible exhibitor upon all the exchanges within said State.

Among others, the following abuses were comomnly practiced:

(a) Throughout the United States, including the State of Nebraska, the rentals of films are uniformly either paid by the exhibitor in advance of the exhibition of the picture, including cost of transportation from and back to the exchange, or else the films are sent to the exhibitor pursuant to contract between the distributor and the exhibitor, collect on delivery, and by contract the exhibitor is obliged to return them to the exchange, transportation charges prepaid, and this rental of the film as fixed by each exchange, is based in part upon this consideration.

26 Many exhibitors in the State of Nebraska frequently in violation of their contracts with the exchanges refused to accept a film with a C. O. D. tag attached, thereby breaching their contract with the exchange, subjecting it to the expense of needless transportation and causing a loss of revenue, resulting from the delayed return of the film.

(b) The exhibitors repeatedly and continually returned films to the exchanges with express and transportation charges C. O. D., thereby breaching their contract and compelling the exchange to take up and receive the film or else to go without it and by so doing render the exchange unable to perform its contracts with other exhibitors for the subsequent exhibition of the same picture.

(c) Similarly, such exhibitors had no regard for the obligations of their contracts and certain illegitimate practices were commonly adopted by the irresponsible exhibitors in violation of their contracts and contrary to the obligations of fair trade, to the great loss and damage of the exchange.

An irresponsible exhibitor who received a film for exhibition at his theatre would frequently delay its return after its exhibition at his theatre and then surreptitiously deliver it to a nearby theatre for exhibition therein upon such terms as he could effect with the second exhibitor, appropriating and converting the sub-rental thus received to his own use. This illegitimate practice is known in the

trade as "bicycling," and is most serious and damaging in its consequences to the exchange, due to the fact that it deprives the exchange of the opportunity to rent the picture to the so-called second exhibitor and other exhibitors in the same vicinity, it constitutes an infringement of the copyright of the subject thus exhibited and the delay occasioned by the unauthorized use of the film by the first exhibitor, commonly prevents the exchange from performing its contracts for its subsequent exhibition with other exhibitors. Again, such an exhibitor frequently exhibited a picture in his own theatre on additional days not included in his contract and without compensating the distributor therefor.

(d) Frequently either as the result of ignorance on the part of the exhibitor or gross carelessness in the adjustment of the exhibitor's projection machine, the film of the distributor is torn, mutilated and damaged, and the exhibitor commonly refused to make any adjustment thereof and the distributor was left without redress.

(e) Notwithstanding the fact that the business between an exchange and the exhibitor is regarded as a cash business, frequently the exhibitor becomes indebted to the exchange through practices similar to the following:

Frequently when a C. O. D. shipment of film is presented by the express company to the exhibitor for delivery the exhibitor telephones or telegraphs the exchange, stating that his check in payment of the advance rental is in the mail and has been delayed through no fault of his and requests the exchange to telegraph the express agent to release the film to the exhibitor without the payment of the C. O. D. Thereupon when the exchange complies, no check appears and suit must be brought to recover the rental.

On other occasions the check arrives and when deposited comes back, marked insufficient funds and some times payment stopped by the exhibitor.

(f) Exhibitors have frequently been known to replevin films sent to them C. O. D. by claiming a temporary property right therein, thereby avoiding payment of the C. O. D. charge and such exhibitors then exhibit the picture and refuse to pay the rental.

(g) Such an exhibitor has also accepted a delivery of film under his contract and paid the rental and exhibited the picture and then telegraphed the exchange that he would hold the film until the exchange returned to him the rental he had just paid.

(h) In other instances an exhibitor paid the rental on a film C. O. D. After paying for the film he persuaded the express agent not to return the money to the exchange immediately and while payment was thus delayed the exhibitor swore out an attachment claiming a purely fictitious breach of contract and attached the money he had just paid. In each of the foregoing instances the amount involved was only a comparatively few dollars and the exhibitors indulging in such unfair practices well knew the fact

to be that it would cost more to collect the damages they thus occasioned the exchange, through judicial process, if collectable at all by such means, than was involved in the entire transaction and so the abuses continued to grow unchecked until the cumulative effect of such abuses become extremely burdensome to the exchanges and occasioned the exchanges great and serious loss and damage.

In addition to the foregoing abuses in the trade and largely because thereof disputes arose from time to time and were apt to continue to arise, not only between the exhibitors and the ex-

changes which disputes tended to promote strife and ill feeling between these two separate branches of the industry but between the large number of persons employed in each such branch and their respective employers, and repeated complaints were received by the exchanges from reputable exhibitors protesting against the unfair and dishonest practices of the irresponsible exhibitors which seriously prejudiced all exhibitors.

Besides the foregoing evils and abuses from which the trade was suffering, matters relating to the transportation and prompt delivery of films by the express companies and through the mails, the establishment of proper police regulations for the suppression of the exhibition of improper films, and the adoption of fire regulations promoting the safety and welfare of the public constantly arose and required the establishment of some organizations. Chamber of Commerce, Association, Clearing House, Board of Trade or body which would undertake the work of bettering and improving industrial conditions without the hope of profit or pecuniary reward.

20. To correct and to relieve the industry from the abuses existing in the trade within the State of Nebraska and particularly those abuses specified herein, to facilitate the exchange of trade information as to available unemployed labor and other subjects of trade interest and to adjust disputes, on or about April 12, 1919, the Omaha Film Board of Trade was duly organized and incorporated under the laws of the State of Nebraska.

The defendants Harry D. Graham, Charles W. Taylor and Sidney Meyer were incorporators of said Board of Trade.

Officers and Directors.

At the incorporation of the Omaha Film Board of Trade, April 12, 1919, the following were elected officers and served as stated below:

President, Harry D. Graham, from April 12, 1919, until annual meeting December 22, 1919.

Vice-President, Charles W. Taylor, from April 12, 1919, until annual meeting December 22, 1919.

Secretary, Sidney Meyer, from April 12, 1919, until September 1, 1919, when he was succeeded by Samuel A. McIntyre, who served till November 17, 1919, when he was succeeded by Thomas E. Delaney, the present secretary.

Treasurer, W. N. Skirboll, from April 12, 1919, until June 8, 1919, when he was succeeded by L. A. Getzler, who in turn was succeeded by Samuel A. McIntyre on November 17, 1919, the present treasurer.

Assistant Secretary, W. F. Coleman, from April 12, 1919, till about October 1, 1919.

Directors.

From April 12, 1919, until annual meeting December 22, 1919, Harry D. Graham, Charles W. Taylor, W. N. Skirboll, Sidney Meyer, C. Earl Holah.

All served until annual meeting except W. N. Skirboll, who resigned on June 8, 1919.

The vacancy was not filled until October 24, 1919, when Samuel A. McIntyre was elected to take his place.

Officers Elected at Annual Meeting, December 22, 1919, and Present Officers.

President, C. Earl Holah, served until May 7, 1920; resigned on that date, Sidney Meyer elected President.

Vice-President, Charles L. Peavey, served from December 22, 1919, until on or about February 10, 1920; succeeded on February 16, 1920, by Charles W. Taylor, present Vice-President.

Secretary, Thomas E. Delaney, present Secretary.

Treasurer, Samuel A. McIntyre, present Treasurer.

Directors Elected at Annual Meeting, December 22, 1919, and Present Directors.

Max Wintraub, Sidney Meyer, Charles W. Taylor.

Charles L. Peavey who resigned on February 10, 1920.

C. Earl Holah who resigned on May 7, 1920.

New directors have not been elected to take their places.

The following defendants were members of the said Board of Trade and so remained as hereinafter stated.

30	Name.	Member from—
	Harry D. Graham.....	April 12, 1919, and still is a member.
	Sidney Meyer	April 12, 1919, and still is a member.
	William F. Coleman....	
	Charles W. Taylor.....	April 12, 1919, and still is a member.
	James H. Calvert.....	April 12, 1919, and remained a member until February 1, 1920.
	Samuel A. McIntyre....	June 10, 1919, and still is a member.
	Edmund J. MacIvor....	About Aug. 1, 1919, and still is a member.
	Charles L. Peavey.....	Apr. 12, 1919, until Feb. 9, 1920, and
	Elmer J. Tilton.....	from March 16, 1920, and still is a member.
	Maude E. Larson.....	Dec. 1, 1919, until

Name.	Member from—
Thomas E. Delaney.....	Nov. 1', 1919, and still is a member.
John J. Milstein.....	
Herbert K. Moss.....	Dec. 1, 1919, until Feb. 5, 1920.
Harry F. Lefholz.....	Feb. 1, 1920, and still is a member.
C. Earl Holah.....	April 12, 1919, resigned May 7, 1920.
Max Wintraub	April 12, 1919, and still is a member.

The purposes and objects for which said Board was formed were as stated in Article III of the Articles of Association of said Board, in part as follows:

"Article III.

The general nature of the business shall be to promote acquaintanceship and good will amongst those engaged in the film and picture business; to promote the interest and elevate the standard of the motion picture and film picture in this section of the country; to acquire and disseminate valuable business information and maintain and operate a trade and information bureau and exchange for the collection and supplying of information relative to the motion pictures and film industry, including the credit and standing of firms, corporations and individuals, as to available unemployed labor, and as to other subjects of trade interest; to adjust controversies and business disputes among those engaged in the motion picture business; to align the film business with the other forces or activities of the community tending towards the community's advancement, patriotism, intelligence and good citizenship."

Said Board was organized, instituted and actually operated solely for the mutual help and benefit of the members who were all employed and engaged in the industry and to carry out and
31 effectuate by lawful means, the lawful purposes and objects above set forth.

While said Board had shares of capital stock, such stock was merely nominal and was, by the provisions of the Articles of Association, stripped of any possible attribute or incident of commercial value by being made non-transferable, except upon conditions which rendered the nominal stock nothing but a certificate of membership in said Board of trade. Said board was not organized, operated or conducted for financial gain or profit and no financial profit or gain to anyone resulted from its operation. It was not organized to engage in any branch of the motion picture business, and did not engage in any branch thereof and transacted no business of any kind or character.

It owned no motion picture film or any other commodity of trade or commerce. It never at any time assumed or attempted to fix the price to be charged as the rental of any films received by its members or others, and it never did any act or thing which either did or could tend to monopolize in whole or in part, trade or com-

merce among the several states or to restrain such trade or to restrict competition therein.

And the membership in said Board was at all times open, free and unrestricted to those employed in any branch of the industry. As a means of effecting its lawful objects and purposes, immediately upon its incorporation, the following by-laws and rules, among others, were adopted by its members.

"Article XXI.

1. That for the purpose of defending its members against imposition, wrongful failure to lift C. O. D. shipments of films the taking of unfair advantage of film service, etc., the Corporation may establish in the office of the Secretary of the Board a clearing house of protective information.

2. That any such information on file with the Secretary desired by any member of the Corporation in good standing shall, on request, be furnished free of charge.

3. That when any acts against which it is the purpose of the Corporation to protect its members, as hereinbefore stated, come to the attention of any member of the Corporation they shall be reported immediately in writing, on forms furnished the members, to the Secretary of the Corporation. This information is to be sent immediately to the members of the Board of Trade.

32 4. That the members of the Board shall keep the Secretary informed of any developments in any case previously reported to him and shall report the final disposition of the case.

6. That it shall be the duty of the Secretary to write every party committing said acts, and so reported to him, requesting said party to state his reasons for such action.

7. That each member of the Board, shall, on request, furnish to the Secretary, in connection with the said purposes such information regarding existing and prospective accounts as may be requested by him.

8. That all information furnished to any member of the Corporation is for his use solely to protect him against said practices and to aid him in determining the propriety of extending credit or the value and condition of an existing credit, and shall be held in strict confidence and not revealed by him to the person reported nor to any other person.

9. That irrespective of the wishes or request of other members of the Corporation each member thereof shall be free to refuse or grant credit to any person.

10. That all expenses incident to the obtaining and furnishing of regular credit information shall be paid by the Corporation.

11. That all expenses incident to the obtaining of information requiring special investigation shall be, in each case, paid by the members or members requesting same."

Also the following trade rules or standards of honest and fair business dealings between the said two branches of the industry were duly adopted by the Board:

"Omaha Film Board of Trade (Inc.).

The Omaha Film Board of Trade is an organization formed primarily to solve the common problems of exchanges and exhibitors, and to adjust all complaints made by, or against the various exchanges and exhibitors. The Board is organized to protect both the exhibitor and the exchange. The Board wishes all exhibitors to file complaints whenever they feel that they have been unjustly treated by exchanges.

Permit me to call particular attention to Rule No. 2, covering payments for film rental. Since contracts invariably call for cash in advance, and since express company remittances for C. O. D.'s

33 have been very unsatisfactory and slow, we urge every exhibitor to spare himself and the exchange much annoyance by remitting amply in advance to eliminate the necessity of a C. O. D. We realize that there arise occasional circumstances where a C. O. D. cannot be avoided, and it is therefore the intent of Rule No. 2 to ship C. O. D. only where remittance in advance has been practically impossible.

Our only desire in adopting these rules is to play equally fair with all exhibitors, as the majority are already complying with them.

We thank you in advance for your co-operation in this matter, and assure you that a strict compliance therewith will make the exchange service to you much more efficient, since it will automatically eliminate practically all conditions that have prevented our giving you 100 per cent. service in the past.

Trade Rules.

Five trade rules, to take effect May 20th, 1919, have been adopted by the Board, as follows:

1.

Transportation Charges: All transportation charges to and from the exchange must be paid by the exhibitor.

2.

Payments: (A) Since the film business is necessarily a cash business, payments for film rentals must be made cash in advance, or all shipments will be made C. O. D. No credit will be extended to any exhibitor. Should any exhibitor refuse a C. O. D. he shall not, in the future be accorded privilege of further C. O. D. shipments, but

shall be furnished film only, providing film rental is received in advance of shipment. In the event that check is received by the exchange after C. O. D. shipment has gone forward, the C. O. D. will not be released, but the check will be returned or applied on other service at the discretion of the exchange.

(B) Payments for advertising matter will be made according to the regulations of the individual exchanges.

3.

Contracts: The exhibitor must carry out all terms as specified in the contracts made with the exchanges. No verbal agreement will be recognized. Exhibitors are cautioned to read carefully all terms of the contracts signed.

34

4.

Change in Booking: In the event any exhibitor desires to change play dates of any films from those originally booked, or contracted, exhibitor must pay for such films before original play dates with the understanding that he has the privilege of playing films without extra charge at sometime other than the regular contracted play dates with that exchange, subject to the films be open for the substituted dates on the records of exchange.

5.

Holding Film: No film shall be held by the exhibitor beyond play dates as per contract. And all damage accruing to the exchange or the brother exhibitor through disregard of this rule shall be borne by the exhibitor responsible."

21. As a means of enforcing these rules for the good of the industry as a whole, within the State of Nebraska, said Board adopted a system whereby when informed of any unfair, dishonest, or illegal practice on the part of an exhibitor or exchange man, the following procedure would be adopted:

Upon the making of a charge against any such person due notice thereof would be given the accused, and an opportunity to be heard, to explain and to defend would be afforded. If the Board of Directors of said Board concluded after full investigation and hearing that the accused had been guilty of the unfair, dishonest or illegal practices charged, contrary to the best interests of the trade, and particularly if the accused had been guilty of any of the offenses above set forth, the said Board of Directors would so decide and thereupon would cause the name of the accused so found to be guilty of such offenses to be placed upon a blue card, which card would be sent to each member of this defendant, to indicate that the said Board of Trade regarded the accused as a person no longer in good standing in said trade.

The members of the said Board of Trade had the right to follow their own business judgment and inclination as to whether thereafter they wished to deal with any person whose name had been placed upon a blue card in the manner specified.

There were no fines or penalties imposed upon any member who wished to and who did deal with any such person.

There was no agreed concert of action against any such person and so soon as such person purged himself of such offense by assurances of proper conduct in the future his name was
35 immediately placed upon a white card and similarly sent to each member of the Board of Trade, and thereafter, as theretofore, the individual members of said Board might deal with such person or not as he might determine for himself.

22. On information and belief, between the years 1915 and 1920, the plaintiff knowing full well the many abuses which existed in the exhibiting branch of the industry in the State of Nebraska and the great opportunity which that branch of the industry presented for profit and gain resulting from unfair, dishonest and illegal practices in connection therewith, began to rent films from various distributors of motion pictures in the City of Omaha, some of whom are defendants herein, for exhibition by him within the State of Nebraska, and plaintiff represented to said distributors and caused them to believe that their said pictures would be exhibited only in theatres owned or actually operated by him.

The said distributors relying upon said representations and believing them to be true, entered into written contracts with the plaintiff for the exhibition of their said motion pictures at the times and places definitely stated in each of said contracts, in all of which contracts the said plaintiff agreed on his part not to subrent or permit the exhibition of the said pictures at any other time or place except as therein stated. With the contracts of one or more of the corporate defendants assuring plaintiff a continuous supply of films which he was authorized to exhibit in about five of the theatres of which he claimed to be proprietor, at the times stated in said contracts, the said plaintiff established relations with the proprietors of about twenty motion picture theatres, most of which were located in the south central part of the State of Nebraska, and undertook and agreed with them to procure motion picture films for exhibition in said motion picture theatres in consideration of the agreement of the proprietors of said theatres to pay to him, the plaintiff, a rental therefor.

After the plaintiff had established his said relations with said exhibitors he proceeded, in violation of the terms of the said contracts with said defendants and without any right or authority so to do, and without the knowledge or consent of any of the defendants, to cause said pictures to be exhibited in approximately twenty of the said motion picture theatres which constituted his alleged circuit and received and derived from the exhibition of the said pictures substantial sums of money from the proprietors of said theatres, all of which he appropriated and converted to his own

36 use. In this manner he rented pictures from some of the corporate defendants for exhibition in five towns and unlawfully caused them to be exhibited in about twenty towns, retaining and converting the rentals to his own use.

On information and belief, as a further means of conducting his unfair, dishonest and illegal practices, plaintiff in several instances attempted to justify his retention of a film for a longer period of time than that authorized in his contract with the distributor, by pretending that his copy of such contract authorized him so to retain it.

These contracts are executed in triplicate and one copy is sent to the home office of the distributor, one is retained by the branch manager, and one is delivered to the exhibitor.

If the contract as signed and accepted by the distributor required the plaintiff to return the film not later than 10 days after its receipt by him, the copy of the contract retained by the plaintiff would be changed to allow him more than 10 days in which to return said film, and during all of the time the film remained in the plaintiff's possession he caused it to be exhibited for his own account and profit as frequently as possible, and this defendant alleges on information and belief that whenever the copy of the contract produced by the plaintiff differs from the copies thereof sent to the home office, either the plaintiff himself altered the contract after its execution and transmission to the home office or he corruptly procured its change and alteration to be made without the knowledge or consent of the distributor.

By unfair, dishonest and unlawful means described above, and other similar means, the plaintiff built up his said business and obtained complete control and dominion over the exhibitors of the small theatres comprising his alleged circuit and by threats, that if any of said exhibitors rented films from anyone other than the plaintiff, he, the plaintiff, would no longer serve him with any films whatever, the said plaintiff attempted to and did completely monopolize a part of the trade and commerce within the State of Nebraska, namely, the business of renting motion picture films to all of the exhibitors thereof in south central part of said State, in violation of Section 4046 and succeeding sections of the Revised Statutes of the State of Nebraska for the year 1913, and contrary to the established usages and customs of fair trade within said state and elsewhere throughout the United States. And defendant further alleges on information and belief, that at all times during the year 1919 the plaintiff's general and common reputation in the motion picture industry in the State of Nebraska for unfair trade and practices therein was bad, and that he was generally regarded as an undesirable and unreliable renter of motion picture films, with whom it was unsafe to transact business.

23. On or about July 7, 1919, a complaint was made to the said Board of Trade by the Sterling Film Corporation, a Nebraska corporation, against the plaintiff, charging in substance that a film belonging to said company, entitled, "A Musical Tramp," had been sent to plaintiff at Minden, Nebraska, through error, on or about

June 8, 1919, and was retained by him until on or about June 20, 1919, at which time he returned it to the Sterling Company from Franklin, Neb.

Plaintiff was duly notified of the charge, corresponded with the Board concerning it, and failed to appear to discuss it in person with the Board when requested so to do.

The attempted explanation presented by the plaintiff in his correspondence was unsatisfactory and failed to explain the charge against him, and after complete investigation of the facts and ample opportunity to plaintiff to appear and defend and after receiving his written attempted explanation, the Board decided upon all the facts that the retention of the film was unjustifiable and thereupon the plaintiff's name was entered upon one of the blue cards of the said Board kept for such purposes and sent by it to its members, thereby indicating that the plaintiff was not regarded by said Board as an exhibitor in good standing in the industry.

On or about October 6, 1919, the Board decided to reinstate the plaintiff as an exhibitor in good standing with its members as to the towns Alma, Franklin, Minden, Bloomington and Blue Hill, Nebraska, in which plaintiff represented he owned or operated theatres, and pursuant to this decision of the Board caused a white card with the name of the plaintiff thereon to be sent to all members of the Board.

About November 4, 1919, defendant H. D. Graham charged plaintiff in substance with the unauthorized exhibition at a motion picture theatre at Kearney, Nebraska, of a film owned or controlled exclusively by defendant Pathé Exchange, Inc., and about November 7, 1919, the defendant Maude Larson charged that plaintiff had detained a number of films returnable to the defendant Hallmark Company from 5 to 10 days beyond the time and period allowed by contract for their retention.

Thereafter plaintiff was notified by said Board that there would be a hearing on said charges and he was requested to appear

38 and offer any explanation or defense thereto he might have.

Plaintiff appeared at the hearing on or about November 13, 1919, and the charges were proved and admitted by plaintiff to be true, and thereupon the Board issued a blue card and forwarded the information conveyed thereby to its members, namely, that the said plaintiff was no longer regarded by said Board and its Board of Directors as an exhibitor in good standing in the industry.

This defendant denies that any false charges were brought before The Board of Trade against plaintiff by its members and denies that plaintiff had no knowledge of the charges against him, and denied that he was given no opportunity to be heard. Defendant admits that the persons alleged to have been present at this meeting in paragraph 45 of plaintiff's petition were present thereat and that the members of the Board of Trade then present stated the terms upon which in their judgment the Board would be justified in advising its members that the plaintiff was entitled to be regarded as reinstated as an exhibitor in good standing in said industry, but plaintiff declined to accept or comply with such con-

ditions, in consequence of which no change was made in the decision of the Board that the plaintiff's name was properly and justly placed upon its so-called blue card list and allowed to remain thereon.

On information and belief, that one or more of the corporate defendants, after receiving the information above described from the said Board of Trade, concluded their business relations with the plaintiff, pursuant to the right so to do reserved in their written contracts with the plaintiff and ceased to supply him with films or film service, and thereafter one or more of the corporation defendants declined to rent the plaintiff any more pictures or furnish him any more service in connection therewith, but this was a matter of individual business judgment and inclination in each case and was not regulated or controlled by said Board or by concerted action of its members, and heretofore and long prior to the formation of the defendant Board of Trade several of the corporate defendants ceased to supply the plaintiff with films, not only because of their individual disinclination so to do but at the express request of the plaintiff.

This defendant further alleges on information and belief that in or about the months of July and August, 1919, the plaintiff had subsisting contracts with only three of the corporate defendants, namely, the Pathé Exchange, Inc., the Famous Players-Lasky Corporation and the defendant A. H. Blank, through whom the right to exhibit the pictures of the defendant First National Exhibitors Circuit was and is obtainable, and this defendant alleges on information and belief that at no time since July, 1919, or at any other time has there been any difficulty on plaintiff's part in obtaining film service from a substantial number of the corporate defendants herein and from other producers and distributors of motion pictures who are not members of said Board of Trade or in any way connected or affiliated therewith or with any of the defendants herein, and this defendant alleges on information and belief that the plaintiff is still continuing to operate secretly one or more of the theatres claimed to be owned by him and that if, as he alleges, he has lost the business of the theatre proprietors constituting his alleged circuit, such loss of business results from natural causes, to wit, because such theatre proprietors are no longer restrained, coerced or influenced by the threats of the plaintiff as hereinbefore alleged because said exhibitors can now obtain the lawful right to exhibit the subjects controlled by the defendants from each corporate defendant separately and because the evil and unlawful influence of the plaintiff among the said exhibitors constituting his alleged circuit has been removed not by any act of any of the defendants herein, but by the said exhibitors themselves breaking the bonds of monopoly by which plaintiff controlled them, and by re-establishing the active competition among themselves which the unlawful and monopolistic activities of the plaintiff in South Central Nebraska had for a time suspended and restrained, as aforesaid, and this defendant further alleges that this action is not brought and is not maintained by the plaintiff in good faith and that its institution and maintenance is an effort on the part of the

plaintiff to capitalize and recover from the defendants three times the amount of the losses plaintiff claims to have sustained, although said losses, if any, resulted as heretofore stated from natural causes and from the plaintiff's inability to continue to conduct an illegitimate business for a further period of time at a profit.

And this defendant further alleges that the information communicated by said Board of Trade as aforesaid to its members of and concerning the plaintiff was privileged in that it was based upon information derived from sources deemed by it to be accurate and reliable and was nothing more than confidential report of a credit or mercantile agency to its members, rating one of their customers, and was transmitted in the usual course of its operations without malice toward the plaintiff and without any purpose or intent to injure or impair any lawful business in which the plaintiff might *by* engaged, and that such communication was made by said defendant in good faith, with good motives and for justifiable ends, namely, for the protection of its members and to improve and better trade conditions, and to correct the evils and abuses affecting the motion picture industry above described.

That the acts of the defendant Board of Trade were lawfully done in good faith, pursuant to its lawful purposes and objects, without intent to restrain and actually without exerting any restraint upon or monopoly or attempted monopoly of any part of the trade or commerce among the several states and without any actual injury of any kind or character to the plaintiff above named.

And this defendant further alleges that the contracts between the corporate defendants and this plaintiff, while in full force and effect, required such defendants to perform for the plaintiff work, labor and services in furnishing and delivering to the plaintiff the films for exhibition and the advertising material incidental thereto, and that each of such defendants singly or in concert had the right to terminate such relation of employment in accord with their said contracts and to cease to perform such work and labor and to recommend, advise and persuade others so to do and to attend at any place for the purpose of obtaining information from and of communicating information to each other, and that each and all of the acts of the defendants and each of them were lawful acts and none of them violated or tended to violate any provision of any of the Anti-Trust Acts or any other laws enacted by the Congress of the United States.

And this defendant expressly sets up and claims the rights, privileges and immunities resulting, separately and conjunctively from Section 6 and Section 20 of the Act of Congress, approved October 15, 1914, commonly known as the Clayton Act, for its own benefit and for the benefit of its officers, directors and members.

And this defendant alleges that at none of the times mentioned in the petition herein or at any other time was it ever a member of the defendant Omaha Film Board of Trade.

24. All matter not herein specifically admitted to be true are denied.

41 Wherefore, defendant prays that the plaintiff's petition be dismissed and that the defendant go hence with its costs herein expended.

JOHN J. SULLIVAN,
Omaha, Nebraska,

Attorney for Defendant Metro Pictures Corporation.

STATE OF NEW YORK,
County of New York, ss:

Charles K. Stery, being duly sworn, deposes and says that he is Asst. Treas. of the Metro Pictures Corporation, a corporation, one of the defendants above named; that he has read the foregoing answer, and the facts therein stated are true as he verily believes.

CHARLES K. STERY.

Subscribed in my presence and sworn to before me this 2nd day of July, 1920.

[Notarial Seal.]

MARIE A. RITTER,
Notary Public.

Notary Public, Kings County #54.
Certificate Filed in New York Co. #84.

Endorsed: Filed Mar. 28 1921. R. C. Hoyt, Clerk.

(Answer of the Defendant Eugene M. Blazier.)

(Filed in the U. S. District Court on March 28, 1921.)

Comes now the defendant Eugene M. Blazier, and for his separate answer to the alleged cause of action set forth in the petition herein: [:]

1. Denies that he has any knowledge or information sufficient to form a belief as to any of the matters alleged in the paragraphs of the petition marked and numbered, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 21½, except as hereinafter specifically admitted, and all such matters are therefore denied.

2. This defendant admits all of the allegations of paragraph 22 of the petition except the statement contained therein that said Board was "doing business" within the State of Nebraska which allegations this defendant denies.

3. Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the matters alleged in the paragraphs of the petition marked and numbered, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, except as hereinafter specifically admitted, and all such matters are therefore denied.

4. On information and belief denies each and every allegation contained in the paragraph of the petition marked and numbered 41.

5. Denies each and every allegation contained in the paragraph of the petition marked and numbered 42, except as hereinafter specifically admitted.

6. Denies any knowledge or information sufficient to form a belief as to the truth of any of the matters alleged in the paragraph of the petition marked and numbered 43.

7. Denies each and every allegation contained in the paragraphs of the petition marked and numbered 44, 45, 46, 47, 48, 49, 50, except as hereinafter specifically admitted.

8. This defendant admits that defendant Pathé Exchange, Inc., was at the times mentioned in the petition a corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Harry D. Graham was branch manager, from about February 1, 1919 to the present time.

9. This defendant admits that Famous Players-Lasky Corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Charles L. Peavey was branch manager from about March, 1919, until about February 10, 1920.

10. This defendant admits that Select Pictures Corporation was at the times mentioned in the petition a corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Charles W. Taylow was branch manager from about October 8, 1917, to the present time.

11. This defendant admits that Fox Film Corporation was at the times mentioned in the petition a corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Sidney Meyer was branch manager from April 19, 1918, to the present time.

43 12. This defendant admits that A. H. Blank, doing business under the name of the A. H. Blank Enterprises, maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant C. Earl Holah was branch manager from June 15, 1918 to May 7, 1920.

13. This defendant admits that Vitagraph, Inc., erroneously sued herein as Vitagraph-Lubin-Selig-Essanay, Inc., was at the times mentioned in the petition a corporation organized under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Thomas E. Delaney was branch manager from November 17, 1919, to the present time.

14. This defendant admits that Universal Film Exchanges, Inc., was at the times mentioned in the petition a corporation organized

under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which James H. Calvert was branch manager from December 29, 1918 to January 31, 1920 and the defendant Harry F. Lefholz was branch manager from February 1, 1920 to the present time.

15. This defendant admits that Enterprise Distributing Corporation was at the times mentioned in the petition a corporation organized under the laws of the State of — and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Herbert K. Moss was branch manager from October 10, 1919 to February 5, 1920.

16. This defendant admits that Fontenelle Feature Film Company was at the times mentioned in the petition a corporation organized under the laws of the State of Nebraska and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Max Wintraub was president and general manager from May 1, 1917 to the present time.

17. This defendant admits that Hallmark Pictures Corporation was at the times mentioned in the petition a corporation organized under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Maude E. Larson was branch manager from December 1, 1919, to about December 8, 1919.

For a complete defense to each and all of the matters set forth in the plaintiff's petition this defendant alleges:

18. Between the years 1915 and 1920, the motion picture industry in the United States of America was and still is composed of three primary branches, each conducted by those known respectively as (a) producers, (b) distributors, also known as exchange-men, and (c) exhibitors.

(a) At all such times there were within the United States, and still are a large number of producers, entirely disassociated with any of the defendants named herein producing large quantities of desirable motion pictures all of which are available to exhibitors within the State of Nebraska. The producers of motion pictures conduct their business by acquiring the exclusive motion picture rights throughout this country and generally throughout the world in and to literary and dramatic subjects, most of which subjects are duly copyrighted in this country, and after the subject to be pictured has been reduced to scenario form, and the cast of players who are to enact various parts therein have been selected, the work of taking the pictures in the studios and elsewhere begins, and when completed the various scenes thus photographed are assembled in continuity so as to display in picture form the story of the subject so pictured. After the negative motion picture is completed and duly assembled and titled, from forty to one hundred copies thereof are printed on positive film and wound upon reels made for that purpose, in

lengths of approximately one thousand feet each. These copies are variously known as positive prints, positives, copies and prints.

Thereupon, two prints of each subject are duly entered in the office of the Registrar of Copyrights in Washington, District of Columbia, for copyright, and copyright throughout the United States is thereupon granted thereon.

(b) For the purpose of distributing the prints of such motion pictures to and causing them to be exhibited by exhibitors, the country is divided by most of the distributors into approximately twenty or more territorial districts or zones, not always embracing the same identical territory, but generally embracing substantially the same, and in each zone or district those engaged in the business of distributing and renting motion pictures to exhibitors therein, maintain an office, commonly known as an exchange within a city commonly used by those engaged in such business, as the film centre from which to distribute said films throughout such zone or district. Some of the corporate defendants herein maintain what is known as a national organization for the distribution of pictures, controlled exclusively by them, and maintain an exchange in each one of the film centres in each of the twenty zones or districts described above,

45 while each film centre also contains one or more local exchanges, sometimes called independent exchanges, the business of which is generally confined to the particular zone or district in which the city which constitutes the film centre for that locality is situated, or to the territory adjacent thereto.

The State of Nebraska is within a zone or territory generally served with motion pictures from the City of Omaha, which is the film centre of that State.

The whole territory, so served generally, includes part of the State of Iowa, part of the State of South Dakota, and the major part of the State of Nebraska, but the primary part of the territory is that within the State of Nebraska and the portion of the territory outside of the State is regarded as only incidental to the territory within said State. Said territory is also frequently and conveniently served from the cities of Kansas City, Missouri, Minneapolis, Minnesota, and Denver, Colorado.

The zone or territory of which the State of Nebraska is a part is known in the motion picture industry as a two per cent. territory, which means that only two per cent. of the rental received from the exhibition of a picture within the United States, is derived from such zone or territory.

The invariable practice of the corporate defendants maintaining an exchange in the City of Omaha, is to deliver to such exchange from one or more points beyond the State of Nebraska, generally from two to five prints of each motion picture subject, which prints are from the date of delivery thereof at Omaha, ready to be rented to exhibitors within said State and the said prints so delivered to the exchanges at Omaha, then become and thereafter remain in consumption and mingled as much as from their nature they can be, with other property of the State and are used for repeated exhibitions therein, until the said prints are physically exhausted and of no further use for exhibition purposes.

The distributors of motion pictures acquire from the owners of the pictures, and from the owners of the United States copyright thereon, by contract, the exclusive right and authority for a specified time and within a specified territory, to distribute and to rent to motion picture exhibitors within such territory and not elsewhere, the positive prints entrusted to said distributor, and pursuant to such authority, and in the exercise of such exclusive right and privilege, which is of great value to the distributor, the distributor enters into a large number of contracts with the individual motion picture exhibitors within each zone or district as described above, for the exhibition therein of the pictures controlled by such distributor. These contracts, individually involve comparatively small rentals, ranging in the country and outlying districts in the State of Nebraska in amounts from \$1.50 to \$7.50 per reel, for the exclusive privilege of exhibiting at a specified theatre for a specified day, a particular motion picture subject and immediately after the exhibition of a picture has been concluded, the duty is uniformly imposed upon the exhibitor thereof, by contract, to return the film without delay, transportation charges prepaid, to the exchange from which he received it and if he fails in this, the time, place of exhibition and the prompt redelivery of the film, being of the essence of the agreement, serious damage to the distributor generally results, since the distributor becomes unable to fill his contracts with other exhibitors for the exhibition of the same film in other parts of the state. And the nature of the business of the distributor is such that its success is necessarily entirely dependent upon the exact and punctual performance by the exhibitor of his contract with the distributor and upon the distributor's ability to preserve inviolate the exclusive character of his right to cause the prints of each motion picture subject entrusted to his charge to be exhibited only under authority conferred by him as to the time and place of exhibition and the promiscuous and unauthorized exhibition of such prints would not only constitute an unlawful infringement of the copyright thereon, but would tend to destroy the business of the distributor and render him liable to respond in damage to other exhibitors with whom he had contracted for the subsequent delivery of the same film.

(c) On information and belief during the times mentioned above, there were within the United States and still are upwards of 15,000 motion picture theatres, about 665 of which are situated within the territory served from the City of Omaha, and about 341 of which are within that part of the State of Nebraska, which is served from said city. These theatres are owned, leased or operated by exhibitors, who are the primary consumers of the industry and who rent the films from the distributors and exhibit the pictures thereon to the public, the ultimate consumer, for an admission fee.

Each performance lasts about two hours, and during the day and evening about six performances are usually given at each theatre.

Each performance consists of the exhibition of about eight
47 reels of motion pictures, which is approximately 8,000 feet of motion picture film, and frequently exhibitors rent from a single distributor what is sometimes described as an entire show or

program, which generally consists of a drama, generally five reels in length, commonly known as a feature film, and two short subjects, one of two reels in length and one of one reel.

The rental price for such entire programs throughout the State of Nebraska ranges from \$12 to \$60, depending upon the pictures which comprise any particular program, the chief elements of value being the literary or dramatic subject matter upon which the pictures are based, the popularity of the stars and actors depicted therein, the skill with which the work of production is executed, and particularly the proximity of the date of exhibition to the date upon which the picture was "released," which means the date upon which it was first available for exhibition throughout this country.

The majority of the theatres within the State of Nebraska are small and are situated in small towns not easily accessible from the City of Omaha.

During the times heretofore stated, a large number of small motion picture theatres sprang up within the State of Nebraska, especially in the country districts, some of which were conducted by men who were inexperienced in and ignorant of the business, many of whom were men of little or no means and some of whom were entirely irresponsible and had no regard for the faithful performance of their contracts and were not entitled to be trusted with possession of valuable property, such as motion picture films.

19. As the result of these conditions in the exhibiting branch of the motion picture industry within the State of Nebraska, a great number of petty, but serious abuses were practiced continuously by the small and irresponsible exhibitor upon all the exchanges within said State.

Among others, the following abuses were commonly practiced:

(a) Throughout the United States, including the State of Nebraska, the rentals of films are uniformly either paid by the exhibitor in advance of the exhibition of the picture, including cost of transportation from and back to the exchange, or else the films are sent to the exhibitor, pursuant to contract between the distributor and the exhibitor, collect on delivery and by contract the exhibitor is obliged to return them to the exchange, transportation charges prepaid, and this rental of the film as fixed by each exchange.

48 is based in part upon this consideration.

Many exhibitors in the State of Nebraska frequently in violation of their contracts with the exchanges refused to accept a film with a C. O. D. tag attached, thereby breaching their contract with the exchange, subjecting it to the expense of needless transportation and causing a loss of revenue, resulting from the delayed return of the film.

(b) The exhibitors repeatedly and continually returned films to the exchanges with express and transportation charges C. O. D., thereby breaching their contract and compelling the exchange to take up and receive the film or else to go without it and by so doing

render the exchange unable to perform its contracts with other exhibitors for the subsequent exhibition of the same picture.

(c) Similarly, such exhibitors had no regard for the obligations of their contracts and certain illegitimate practices were commonly adopted by the irresponsible exhibitors in violation of their contracts and contrary to the obligations of fair trade, to the great loss and damage of the exchange.

An irresponsible exhibitor who received a film for exhibition at his theatre would frequently delay its return after its exhibition at his theatre and then surreptitiously deliver it to a nearby theatre for exhibition therein upon such terms as he could effect with the second exhibitor, appropriating and converting the sub-rental thus received to his own use. This illegitimate practice is known in the trade as "bicycling," and is most serious and damaging in its consequences to the exchange, due to the fact that it deprives the exchange of the opportunity to rent the picture to the so-called second exhibitor and other exhibitors in the same vicinity, it constitutes an infringement of the copyright of the subject thus exhibited and the delay occasioned by the unauthorized use of the film by the first exhibitor, commonly prevents the exchange from performing its contracts for its subsequent exhibition with other exhibitors. Again, such an exhibitor frequently exhibited a picture in his own theatre on additional days not included in his contract and without compensating the distributor therefor.

(d) Frequently either as the result of ignorance on the part of the exhibitor or gross carelessness in the adjustment of the exhibitor's projection machine, the film of the distributor is torn, mutilated and damaged, and the exhibitor commonly refused to make any adjustment thereof and the distributor was left without redress.

49 (e) Notwithstanding the fact that the business between an exchange and the exhibitor is regarded as a cash business, frequently the exhibitor becomes indebted to the exchange through practices similar to the following:

Frequently when a C. O. D. shipment of film is presented by the express company to the exhibitor for delivery the exhibitor telephones or telegraphs the exchange, stating that his check in payment of the advance rental is in the mail and has been delayed through no fault of his and requests the exchange to telegraph the express agent to release the film to the exhibitor without the payment of the C. O. D. Thereupon when the exchange complies, no check appears and suit must be brought to recover the rental.

On other occasions the check arrives and when deposited comes back, marked insufficient funds and sometimes payment stopped by the exhibitor.

(f) Exhibitors have frequently been known to replevin films sent to them C. O. D. by claiming a temporary property right therein, thereby avoiding payment of the C. O. D. charge and such exhibitors then exhibit the picture and refuse to pay the rental.

(g) Such an exhibitor has also accepted a delivery of film under his contract and paid the rental and exhibited the picture and then telegraphed the exchange that he would hold the film until the exchange returned to him the rental he had just paid.

(h) In other instances an exhibitor paid the rental on a film C. O. D. After paying for the film he persuaded the express agent not to return the money to the exchange immediately and while payment was thus delayed the exhibitor swore out an attachment claiming a purely fictitious breach of contract and attached the money he had just paid.

In each of the foregoing instances the amount involved was only a comparatively few dollars and the exhibitors indulging in such unfair practices well knew the fact to be that it would cost more to collect the damages they thus occasioned the exchange, through judicial process, if collectable at all by such means, than was involved in the entire transaction and so the abuses continued to grow unchecked until the cumulative effect of such abuses became extremely burdensome to the exchanges and occasioned the exchanges great and serious loss and damage.

50 In addition to the foregoing abuses in the trade and largely because thereof disputes arose from time to time and were apt to continue to arise, not only between the exhibitors and the exchanges which disputes tended to promote strife and ill feeling between these two separate branches of the industry, but between the large number of persons employed in each such branch and their respective employers, and repeated complaints were received by the exchanges from reputable exhibitors protesting against the unfair and dishonest practices of the irresponsible exhibitors which seriously prejudiced all exhibitors.

Besides the foregoing evils and abuses from which the trade was suffering, matters relating to the transportation and prompt delivery of films by the express companies and through the mails, the establishment of proper police regulations for the suppression of the exhibition of improper films, and the adoption of fire regulations promoting the safety and welfare of the public constantly arose and required the establishment of some organization, Chamber of Commerce, Association, Clearing House, Board of Trade or body which would undertake the work of bettering and improving industrial conditions without the hope of profit or pecuniary reward.

20. To correct and to relieve the industry from the abuses existing in the trade within the State of Nebraska and particularly those abuses specified herein, to facilitate the exchange of trade information as to available unemployed labor and other subjects of trade interest and to adjust disputes, on or about April 12, 1919, the Omaha Film Board of Trade was duly organized and incorporated under the laws of the State of Nebraska.

The defendants Harry D. Graham, Charles W. Taylor and Sidney Meyer were incorporators of said Board of Trade.

Officers and Directors.

At the incorporation of the Omaha Film Board of Trade, April 12, 1919, the following were elected officers and served as stated below:

President, Harry D. Graham, from April 12, 1919, until annual meeting December 22, 1919.

Vice-President, Charles W. Taylor, from April 12, 1919, until annual meeting December 22, 1919.

Secretary, Sidney Meyer, from April 12, 1919, until September 1, 1919, when he was succeeded by Samuel A. McIntyre, who served till November 17, 1919, when he was succeeded by Thomas E. Delaney, the present secretary.

Treasurer, W. N. Skirboll, from April 12, 1919, until June 8, 1919, when he was succeeded by L. A. Getzler, who in turn was succeeded by Samuel A. McIntyre on November 17, 1919, the present treasurer.

Assistant Secretary, W. F. Coleman, from April 12, 1919, till about October 1, 1919.

Directors.

From April 12, 1919, until annual meeting December 22, 1919, Henry D. Graham, Charles W. Taylor, W. N. Skirboll, Sidney Meyer, C. Earl Holah.

All served until annual meeting except W. N. Skirboll, who resigned on June 8, 1919.

The vacancy was not filled until October 24, 1919, when Samuel A. McIntyre was elected to take his place.

Officers Elected at Annual Meeting December 22, 1919, and Present Officers.

President, C. Earl Holah, served until May 7, 1920; resigned on that date, Sidney Meyer elected President.

Vice-President, Charles L. Peavey, served from December 22, 1919, until on or about February 10, 1920; succeeded on February 16, 1920, by Charles W. Taylor, present Vice-President.

Secretary, Thomas E. Delaney, present Secretary.

Treasurer, Samuel A. McIntyre, present Treasurer.

Directors Elected at Annual Meeting December 22, 1919, and Present Directors.

Max Wintraub, Sidney Meyer, Charles W. Taylor.

Charles L. Peavey who resigned on February 10, 1920.

C. Earl Holah who resigned on May 7, 1920.

New directors have not been elected to take their places.

The following defendants were members of the said Board of Trade and so remained as hereinafter stated:

52 Name.

Member from—

Harry D. Graham.....April 12, 1919, and still is a member.
 Sidney Meyer.....April 12, 1919, and still is a member.
 William F. Coleman.
 Charles W. Taylor.....April 12, 1919, and still is a member.
 James H. Calvert.....April 12, 1919, and remained a member
 until February 1, 1920.
 Samuel A. McIntyre...June 10, 1919, and still is a member.
 Edmund J. MacIvor...About Aug. 1, 1919, and still is a member.
 Charles L. Peavey.....Apr. 12, 1919, until Feb. 9, 1920, and from
 March 16, 1920, and still is a member.
 Elmer J. Tilton.
 Maude E. Larson.....Dec. 1, 1919, until
 Thomas E. Delaney...Nov. 17, 1919, and still is a member.
 John J. Milstein.
 Herbert K. Moss.....Dec. 1, 1919, until Feb. 5, 1920.
 Harry F. Lefholz.....Feb. 1, 1920, and still is a member.
 C. Earl Holah.....April 12, 1919, resigned May 7, 1920.
 Max Wintraub.....April 12, 1919, and still is a member.

The purposes and objects for which said Board was formed were as stated in Article III of the Articles of Association of said Board, in part as follows:

"Article III.

The general nature of the business shall be to promote acquaintanceship and good will amongst those engaged in film and picture business; to promote the interest and elevate the standard of the motion picture and film picture in this section of the country; to acquire and disseminate valuable business information and maintain and operate a trade and information bureau and exchange for the collection and supplying of information relative to the motion picture and film industry, including the credit and standing of firms, corporations and individuals, as to available unemployed labor, and as to other subjects of trade interest; to adjust controversies and business disputes among those engaged in the motion picture business; to align the film business with the other forces or activities of the community tending towards the community's advancement, patriotism, intelligence and good citizenship."

Said Board was organized, instituted and actually operated solely for the mutual help and benefit of the members who were all employed and engaged in the industry and to carry out and effectuate by lawful means, the lawful purposes and objects above set forth.

53

While said Board had shares of capital stock, such stock was merely nominal and was, by the provisions of the Articles of Association, stripped of any possible attribute or incident of commercial value by being made non-transferable, except upon

conditions which rendered the nominal stock nothing but a certificate of membership in said Board of Trade. Said Board was not organized, operated or conducted for financial gain or profit and no financial profit or gain to anyone resulted from its operation. It was not organized to engage in any branch of the motion picture business, and did not engage in any branch thereof and transacted no business of any kind or character.

It owned no motion picture film or any other commodity of trade or commerce. It never at any time assumed or attempted to fix the price to be charged as the rental of any films received by its members or others, and it never did any act or thing which either did or could tend to monopolize, in whole or in part, trade or commerce among the several states or to restrain such trade or to restrict competition therein.

And the membership in said Board was at all times open, free and unrestricted to those employed in any branch of the industry. As a means of effecting its lawful objects and purposes, immediately upon its incorporation, the following by-laws and rules, among others, were adopted by its members:

"Article XXI.

1. That for the purpose of defending its members against imposition, wrongful failure to lift C. O. D. shipments of films, the taking of unfair advantage of film service, etc., the Corporation may establish in the office of the Secretary of the Board a clearing house of protective information.

2. That any such information on file with the Secretary desired by any member of the Corporation in good standing shall, on request, be furnished free of charge.

3. That when any acts against which it is the purpose of the Corporation to protect its members, as hereinbefore stated, come to the attention of any member of the Corporation they shall be reported immediately in writing, on forms furnished the members, to the Secretary of the Corporation. This information is to be sent immediately to the members of the Board of Trade.

4. That the members of the Board shall keep the Secretary informed of any developments in any case previously reported to him and shall report the final disposition of the case.

54 6. That it shall be the duty of the Secretary to write every party committing said acts, and so reported to him, requesting said party to state his reasons for such action.

7. That each member of the Board, shall, on request, furnish to the Secretary, in connection with the said purposes, such information regarding existing and prospective accounts as may be requested by him.

8. That all information furnished to any member of the Corporation is for his use solely to protect him against said practices and to aid him in determining the propriety of extending credit or the value and condition of an existing credit, and shall be held in strict confidence and not revealed by him to the person reported nor to any other person.

9. That irrespective of the wishes or request of other members of the Corporation each member thereof shall be free to refuse or grant credit to any person.

10. That all expenses incident to the obtaining and furnishing of regular credit information shall be paid by the Corporation.

11. That all expenses incident to the obtaining of information requiring special investigation shall be, in each case, paid by the members or members requesting same."

Also the following trade rules or standards of honest and fair business dealings between the said two branches of the industry were duly adopted by the Board:

"Omaha Film Board of Trade (Inc.).

The Omaha Film Board of Trade is an organization formed primarily to solve the common problems of exchanges and exhibitors, and to adjust all complaints made by, or against the various exchanges and exhibitors. The Board is organized to protect both the exhibitor and the exchange. The Board wishes all exhibitors to file complaints whenever they feel that they have been unjustly treated by exchanges.

Permit me to call particular attention to Rule No. 2, covering payments for film rental. Since contracts invariably call for cash in advance, and since express company remittances for C. O. D.'s have been very unsatisfactory and slow, we urge every exhibitor to spare himself and the exchange much annoyance by remitting amply in advance to eliminate the necessity of a C. O. D. We realize that there

arise occasional circumstances where a C. O. D. cannot be avoided, and it is therefore the intent of Rule No. 2 to ship C. O. D. only where remittance in advance has been practically impossible.

Our only desire in adopting these rules is to play equally fair with all exhibitors, as the majority are already complying with them.

We thank you in advance for your co-operation in this matter, and assure you that a strict compliance therewith will make the exchange service to you much more efficient, since it will automatically eliminate practically all conditions that have prevented our giving you 100 per cent. service in the past.

Trade Rules.

Five trade rules, to take effect May 20th, 1919, have been adopted by the Board, as follows:

1.

Transportation Charges: All transportation charges to and from the exchange must be paid by the exhibitor.

2.

Payments: (A) Since the film business is necessarily a cash business, payments for film rentals must be made cash in advance, or all shipments will be made C. O. D. No credit will be extended to any exhibitor. Should any exhibitor refuse a C. O. D. he shall not, in the future, be accorded privilege of further C. O. D. shipments, but shall be furnished film only, providing film rental is received in advance of shipment. In the event that check is received by the exchange after C. O. D. shipment has gone forward, the C. O. D. will not be released, but the check will be returned or applied on other service at the discretion of the exchange.

(B) Payments for advertising matter will be made according to the regulations of the individual exchanges.

3.

Contracts: The exhibitor must carry out all terms as specified in the contracts made with the exchanges. No verbal agreement will be recognized. Exhibitors are cautioned to read carefully all terms of the contracts signed.

4.

Change in Booking: In the event any exhibitor desires to change play dates of any films from those originally booked, or contracted, exhibitor must pay for such films before original play dates with the understanding that he has the privilege of playing films without extra charge at some time other than the regular contracted play dates with that exchange, subject to the films be open for the substituted dates on the records of exchange.

5.

Holding Film: No film shall be held by the exhibitor beyond play dates as per contract. And all damage accruing to the exchange or the brother exhibitor through disregard of this rule shall be borne by the exhibitor responsible."

21. As a means of enforcing these rules for the good of the industry as a whole, within the State of Nebraska, said Board adopted a

system whereby when informed of any unfair, dishonest, or illegal practice on the part of an exhibitor or exchange man, the following procedure would be adopted:

Upon the making of a charge against any such person due notice thereof would be given the accused, and an opportunity to be heard, to explain and to defend would be afforded. If the Board of Directors of said Board concluded after full investigation and hearing that the accused had been guilty of the unfair, dishonest or illegal practices charged, contrary to the best interests of the trade, and particularly if the accused had been guilty of any of the offenses above set forth, the said Board of Directors would so decide and thereupon would cause the name of the accused so found to be guilty of such offenses to be placed upon a blue card, which card would be sent to each member of this defendant, to indicate that the said Board of Trade regarded the accused as a person no longer in good standing in said trade.

The members of the said Board of Trade had the right to follow their own business judgment and inclination as to whether thereafter they wished to deal with any person whose name had been placed upon a blue card in the manner specified.

There were no fines or penalties imposed upon any member who wished to and who did deal with any such person.

There was no agreed concert of action against any such person and so soon as such person purged himself of such offense by assurances of proper conduct in the future his name was immediately placed upon a white card and similarly sent to each member of the Board of Trade, and thereafter, as theretofore, the individual members of said Board might deal with such person or not as he might determine for himself.

57 22. On information and belief, between the years 1915 and 1920, the plaintiff knowing full well the many abuses which existed in the exhibiting branch of the industry in the State of Nebraska and the great opportunity which that branch of the industry presented for profit and gain resulting from unfair, dishonest and illegal practices in connection therewith, began to rent films from various distributors of motion pictures in the City of Omaha, some of whom are defendants herein, for exhibition by him within the State of Nebraska, and plaintiff represented to said distributors and caused them to believe that their said pictures would be exhibited only in theatres owned or actually operated by him.

The said distributors, relying upon said representations and believing them to be true, entered into written contracts with the plaintiff for the exhibition of their said motion pictures at the times and places definitely stated in each of said contracts, in all of which contracts the said plaintiff agreed on his part not to subrent or permit the exhibition of the said pictures at any other time or place except as therein stated.

With the contracts of one or more of the corporate defendants assuring plaintiff a continuous supply of films which he was authorized to exhibit in about five of the theatres of which he claimed

to be proprietor, at the times stated in said contracts, the said plaintiff established relations with the proprietors, of about twenty motion picture theatres, most of which were located in the south central part of the State of Nebraska, and undertook and agreed with them to procure motion picture films for exhibition in said motion picture theatres in consideration of the agreement of the proprietors of said theatres to pay to him, the plaintiff, a rental therefor.

After the plaintiff had established his said relations with said exhibitors he proceeded, in violation of the terms of the said contracts with said defendants and without any right or authority so to do, and without the knowledge or consent of any of the defendants, to cause said pictures to be exhibited in approximately twenty of the said motion picture theatres which constituted his alleged circuit and received and derived from the exhibition of the said pictures substantial sums of money from the proprietors of said theatres, all of which he appropriated and converted to his own use. In this manner he rented pictures from some of the corporate defendants for exhibition in five towns and unlawfully caused them to be exhibited in about twenty towns, retaining and converting the rentals to his own use.

58 On information and belief, as a further means of conducting his unfair, dishonest and illegal practices, plaintiff in several instances attempted to justify his retention of a film for a longer period of time than that authorized in his contract with the distributor, by pretending that his copy of such contract authorized him so to retain it.

These contracts are executed in triplicate and one copy is sent to the home office of the distributor, one is retained by the branch manager, and one is delivered to the exhibitor.

If the contract is signed and accepted by the distributor required the plaintiff to return the film not later than 10 days after its receipt by him, the copy of the contract retained by the plaintiff would be changed to allow him more than 10 days in which to return said film, and during all of the time the film remained in the plaintiff's possession he caused it to be exhibited for his own account and profit as frequently as possible, and this defendant alleges on information and belief that whenever the copy of the contract produced by the plaintiff differs from the copies thereof sent to the home office, either the plaintiff himself altered the contract after its execution and transmission to the home office or he corruptly procured its change and alteration to be made without the knowledge or consent of the distributor.

By the unfair, dishonest and unlawful means described above, and other similar means, the plaintiff built up his said business and obtained complete control and dominion over the exhibitors of the small theatres comprising his alleged circuit and by threats, that if any of said exhibitors rented films from anyone other than the plaintiff, he, the plaintiff, would no longer serve him with any films whatever, the said plaintiff attempted to and did completely monopolize a part of the trade and commerce within the State of

Nebraska, namely, the business of renting motion picture films to all of the exhibitors thereof in south central part of said State, in violation of Section 4046 and succeeding sections of the Revised Statutes of the State of Nebraska for the year 1913, and contrary to the established usages and customs of fair trade within said state and elsewhere throughout the United States. And defendant further alleges on information and belief, that at all times during the year 1919 the plaintiff's general and common reputation in the motion picture industry in the State of Nebraska for unfair trade and practices therein was bad, and that he was generally regarded as an undesirable and unreliable renter of motion picture films, with whom it was unsafe to transact business.

59 23. On or about July 7, 1919, a complaint was made to the said Board of Trade by the Sterling Film Corporation, a Nebraska corporation, against the plaintiff, charging in substance that a film belonging to said company, entitled, "A Musical Tramp," had been sent to plaintiff at Minden, Nebraska, through error, on or about June 8, 1919, and was retained by him until on or about June 20, 1919, at which time he returned it to the Sterling Company from Franklin, Neb.

Plaintiff was duly notified of the charge, corresponded with the Board concerning it, and failed to appear to discuss it in person with the Board when requested so to do.

The attempted explanation presented by the plaintiff in his correspondence was unsatisfactory and failed to explain the charge against him, and after complete investigation of the facts and ample opportunity to plaintiff to appear and defend and after receiving his written attempted explanation, the Board decided upon all the facts that the retention of the film was unjustifiable and thereupon the plaintiff's name was entered upon one of the blue cards of the said Board kept for such purposes and sent by it to its members, thereby indicating that the plaintiff was not regarded by said Board as an exhibitor in good standing in the industry.

On or about October 6, 1919, the Board decided to reintstate the plaintiff as an exhibitor in good standing with its members as to the towns Alma, Franklin, Minden, Bloomington and Blue Hill, Nebraska, in which plaintiff represented he owned or operated theatres, and pursuant to this decision the Board caused a white card with the name of the plaintiff thereon to be sent to all members of the Board.

About November 4, 1919, Defendant H. D. Graham charged plaintiff in substance with the unauthorized exhibition at a motion picture theatre at Kearney, Nebraska, of a film owned or controlled exclusively by defendant Pathe Exchange Inc., and about November 7, 1919, the defendant Maude Larson charged that plaintiff had retained a number of films returnable to the defendant Hallmark Company from 5 to 10 days beyond the time and period allowed by contract for their retention.

Thereafter plaintiff was notified by said Board that there would be a hearing on said charges and he was requested to appear and offer any explanation or defense thereto he might have. Plaintiff

appeared at the hearing on or about November 13, 1919, and the charges were proved and admitted by plaintiff to be true, and thereupon the Board issued a blue card and forwarded the information conveyed thereby to its members, namely, that the said plaintiff was no longer regarded by said Board and its Board of Directors as an exhibitor in good standing in the industry.

This defendant denies that any false charges were brought before it against plaintiff by its members and denies that plaintiff had no knowledge of the charges against him, and denies that he was given no opportunity to be heard. Defendant admits that the persons alleged to have been present at this meeting in paragraph 45 of plaintiff's petition were present thereat and that the members of the Board of Trade then present stated the terms upon which in their judgment the Board would be justified in advising its members that the plaintiff was entitled to be regarded as reinstated as an exhibitor in good standing in said industry, but plaintiff declined to accept or comply with such conditions, in consequence of which no change was made in the decision of the Board that the plaintiff's name was properly and justly placed upon its so-called blue card list and allowed to remain thereon.

On information and belief, that one or more of the corporate defendants, after receiving the information above described from the said Board of Trade, concluded their business relations with the plaintiff pursuant to the right so to do reserved in their written contracts with the plaintiff and ceased to supply him with films or film service, and thereafter one or more of the corporate defendants declined to rent the plaintiff any more pictures or furnish him any more service in connection therewith, but this was a matter of individual business judgment and inclination in each case and was not regulated or controlled by said Board or by concerted action of its members, and heretofore and long prior to the formation of the defendant Board of Trade several of the corporate defendants ceased to supply the plaintiff with films, not only because of their individual disinclination so to do, but at the express request of the plaintiff.

This defendant further alleges on information and belief that in or about the months of July and August, 1919, the plaintiff had subsisting contracts with only three of the corporate defendants, namely, the Pathé Exchange, Inc., the Famous Players-Lasky Corporation and the defendant A. H. Blank, through whom the right to exhibit the pictures of the defendant First National Exhibitors Circuit was and is obtainable, and this defendant alleges on information and belief that at no time since July, 1919, or at any other time has there been any difficulty on plaintiff's part in obtaining film service from a substantial number of the corporate defendants herein and from other producers and distributors of motion pictures who are not members of said Board of Trade or in any way connected or affiliated therewith or with any of the defendants herein, and this defendant alleges on information and belief that the plaintiff is still continuing to operate secretly one or more of the theatres claimed to be owned by him and that if, as he alleges, he has lost the business of the theatre proprietors constituting his alleged circuit,

such loss of business results from natural causes, to wit, because such theatre proprietors are no longer restrained, coerced or influenced by the threats of the plaintiff as hereinbefore alleged because said exhibitors can now obtain the lawful right to exhibit the subjects controlled by the defendants from each corporate defendant separately and because the evil and unlawful influence of the plaintiff among the said exhibitors constituting his alleged circuit has been removed not by any act of any of the defendants herein, but by the said exhibitors themselves breaking the bonds of monopoly by which plaintiff controlled them, and by re-establishing the active competition among themselves which the unlawful and monopolistic activities of the plaintiff in South Central Nebraska had for a time suspended and restrained, as aforesaid. And this defendant further alleges that this action is not brought and is not maintained by the plaintiff in good faith and that its institution and maintenance is an effort on the part of the plaintiff to capitalize and recover from the defendants three times the amount of the losses plaintiff claims to have sustained, although said losses, if any, resulted as heretofore stated from natural causes and from the plaintiff's inability to continue to conduct an illegitimate business for a further period of time at a profit.

And this defendant further alleges that the information communicated by said Board of Trade as aforesaid to its members of and concerning the plaintiff was privileged in that it was based upon information derived from sources deemed by it to be accurate and reliable and was nothing more than the confidential report of a credit or mercantile agency to its members, rating one of their customers, and was transmitted in the usual course of its operations without malice toward the plaintiff and without any purpose or intent to injure or impair any lawful business in which the plaintiff might be engaged, and that such communication was made by said defendant in good faith, with good motives and for justifiable ends, namely, for the protection of its members and to improve and better trade conditions, and to correct the evils and abuses affecting the motion picture industry above described.

62 That the acts of the defendant Board of Trade were lawfully done in good faith, pursuant to its lawful purposes and objects, without intent to restrain and actually without exerting any restraint upon or monopoly or attempted monopoly of any part of the trade or commerce among the several states and without any actual injury of any kind or character to the plaintiff above named.

And this defendant further alleges that the contracts between the corporate defendants and this plaintiff, while in full force and effect, required such defendants to perform for the plaintiff work, labor and services in furnishing and delivering to the plaintiff the films for exhibition and the advertising material incidental thereto, and that each of such defendants singly or in concert had the right to terminate such relation of employment in accord with their said contracts and to cease to perform such work and labor and to recommend, advise and persuade others so to do and to attend at any place for the purpose of obtaining information from and of communicating information to each other, and that each and all of the acts of the

defendants and each of them were lawful acts and none of them violated or tended to violate any provision of any of the Anti-Trust Acts or any other laws enacted by the Congress of the United States.

And this defendant expressly sets up and claims the rights, privileges and immunities resulting, separately and conjunctively, from Section 6 and Section 20 of the Act of Congress, approved October 15, 1914, commonly known as the Clayton Act.

24. All matters not herein specifically admitted to be true are denied.

Wherefore, defendant prays that the plaintiff's petition be dismissed and that the defendant go hence with its costs herein expended.

EUGENE N. BLAZER,
Attorney Pro Se.

Bee Bldg., Omaha, Nebraska.

STATE OF NEBRASKA,
County of Douglas, ss:

Eugene M. Blazer, being first duly sworn, deposes and says that he is one of the defendants above named; that he has read the foregoing answer, and the facts therein stated are true as he verily believes.

EUGENE N. BLAZER.

Subscribed in my presence and sworn to before me this 16 day of July, 1920.

[Notarial Seal.]

M. E. FUSTIE,
Notary Public.

Endorsed: Filed Mar. 28, 1921. R. C. Hoyt, Clerk.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the answer to the Pathé Exchange, Inc., was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant, Pathé Exchange, Inc.)

"In or about the month of February, 1919, this defendant' through its branch manager at Omaha, Nebraska, Harry D. Graham, had certain dealings and transactions with the plaintiff of an unsatisfactory nature, in that plaintiff was found to be subletting film belonging to this defendant in Kearney, Nebraska, without any right or authority so to do and in violation of the contracts then existing between the plaintiff and this defendant, and this defendant thereupon caused the plaintiff to be notified that at the expiration of its existing contract with plaintiff it would render him no further film service and would not rent its pictures to plaintiff for exhibition at any time or place.

The plaintiff is now justly indebted to this defendant for services rendered and for the rental of film and the sale of advertising matter in connection therewith, at his special instance and request, in the sum of \$174.55, no part of which has been paid although duly demanded, and this defendant would be unwilling to resume any business dealings with the plaintiff until said plaintiff supplies assurances satisfactory and acceptable to this defendant that any and all films belonging to this defendant, rented to the plaintiff, will be exhibited only at the times and places specified in the contract therefor and returned promptly to the said defendant as stated therein.

24. All matters not herein specifically admitted to be true are denied.

64 Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of Famous Players-Lasky Corporation was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Famous Players-Lasky Corporation.)

"And this defendant further alleges that it never at any time authorized or directed its said branch manager or any other person to perform any act or to omit to perform any act as a member of said Board of Trade in its behalf or for its account or for its benefit and that neither its branch manager or any other person had or now has any right, power or authority, express or implied, to bind this defendant by any act or omission in connection with the said Board of Trade, and that this defendant had no knowledge of what, if any, action the said Board of Trade or any of its members took with reference to this plaintiff or with reference to any of the matters alleged in the petition herein except as hereinbefore stated.

On information and belief, that this defendant at various times entered into contracts with the plaintiff for film service, which contracts were in all respects performed by this defendant.

On information and belief, that during the month of September, 1919, this defendant solicited the business of the plaintiff for certain motion picture theatres which the plaintiff operated, and plaintiff was willing to make contracts with this defendant for certain motion pictures upon terms which were not acceptable to this defendant and that because of that fact and for no other reason, this defendant did not enter into any contracts with the plaintiff.

"That this defendant is, and at all times has been, prepared to supply films and film service to the plaintiff for theatres operated by him, upon terms and conditions that are fair and reasonable, and profitable to this defendant.

24. All matters not herein specifically admitted to be true are denied.

65 Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of Fox Films Corporation was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Fox Films Corporation.)

"This defendant through its branch manager at Omaha, Nebraska, Sidney Meyer, had certain business dealings with the plaintiff herein, which dealings were of an unsatisfactory character in that plaintiff frequently failed and neglected, in violation of his contract with this defendant, to return to the said Fox Film Corporation promptly the films of said company which were leased to the plaintiff and in that plaintiff refused to exhibit films contracted for on the dates contracted for, and failed generally to adhere to the terms of his said contracts with this defendant.

That about the month of June, 1919, this defendant ceased doing business with the plaintiff, but that neither this defendant nor its said branch manager terminated their business relations with the plaintiff. The plaintiff terminated the said relations himself, and this defendant alleges that notwithstanding the unsatisfactory character of plaintiff's past transactions with this defendant this defendant is prepared to resume business dealings with the plaintiff provided and on condition only that the plaintiff can satisfactorily guarantee the faithful and exact performance of any contract he may propose to make with the said defendant.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of the Select Pictures Corporation, was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Select Pictures Corporation.)

"This defendant alleges that through its branch manager at Omaha, Nebraska, it began business dealings with the plaintiff about November, 1918, which business dealings were terminated by the plaintiff and not by this defendant nor by its said branch manager, in the month of January, 1919.

This defendant alleges that the plaintiff's business dealings with it and with its said branch manager were satisfactory and
66 that this defendant and its said branch manager have at all times been and still are ready and willing to supply the plaintiff with films and film service upon substantially the same terms as those supplied to other persons within the State of Nebraska, provided it is reasonably and satisfactorily assured of the faithful performance of any and all contracts so made and entered into by the plaintiff.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of the Vitagraph-Lubin-Selig-Essanay, Inc., was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Vitagraph-Lubin-Selig-Essanay, Inc.)

"This defendant alleges that its business relations with the plaintiff began in or about the month of May 1917 and were terminated at the voluntary request of the plaintiff; and this defendant further alleges that its dealings with the plaintiff were of an unsatisfactory character. The plaintiff during a considerable period of time owed this defendant substantial sums of money, which, although he ultimately paid, occasioned a great deal of annoyance to this defendant in its efforts to induce the plaintiff to pay and discharge his indebtedness.

And this defendant further alleges that in or about the year 1917 it made one or more contracts with the plaintiff which authorized and permitted the plaintiff to retain possession of its films for a period of about ten days or more without requiring the plaintiff to designate the particular theatre and the particular time at which any special motion picture was to be exhibited. But this defendant alleges that contracts of this type are highly undesirable and that it would be unwilling at this or any other future time to enter into contracts of this general nature either with the plaintiff or with anybody else, but defendant alleges that it is ready, willing and has always been ready and willing to supply the plaintiff with films of the defendant, Vitagraph, Inc., upon the same terms as those upon which it supplies such films to other exhibitors in the State of Nebraska, provided only that it receives satisfactory and adequate assurances from the plaintiff of the faithful performance of such contracts as it may care to make with the plaintiff.

67 24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of W. W. Hodkinson Corporation, was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant W. W. Hodkinson Corporation.)

"And this defendant admits that, as alleged in the paragraph of the complaint numbered 13, it was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in the City of New York, County and State of New York, but it denies that it at any time had or maintained a branch office in the City of Omaha, State of Nebraska.

And the defendant, referring to the paragraph of the complaint numbered 27½, further alleges that it was incorporated on October 30, 1917, and that it did not succeed to or continue the business of any predecessor.

And this defendant denies that the defendant John J. Milstein was the branch manager of this defendant as alleged in the paragraph of the complaint numbered 36 and denies that Herbert K. Moss was the branch manager of this defendant as alleged in the paragraph of the complaint numbered 37.

And this defendant denies that at any time it was affiliated with, acted with, worked in conjunction with or was in sympathy with the defendant, Omaha Film Board of Trade, as alleged in the paragraph of the complaint numbered 40.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of Universal Film Exchange, Incorporated, was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Universal Film Exchanges, Incorporated.)

"This defendant further alleges that on or about the 19th day of May 1918 it succeeded the interests of Laemmle Film Service.

68 "This defendant alleges that during the period in which it maintained a branch office at Omaha, Nebraska, it never transacted any business with the plaintiff and plaintiff was never willing to accept the films of the said defendant upon the same or similar terms upon which said corporation supplied its said films to other exhibitors in the State of Nebraska.

On one occasion this defendant through its branch manager, Harry Lefholz, at Omaha, Nebraska, had an opportunity to transact business with the plaintiff, the plaintiff requesting this defendant's branch manager to ship one film of this defendant on Sunday for the plaintiff's use on Monday, the plaintiff asking the privilege of holding the said film until the following Sunday. This defendant through its branch manager advised the plaintiff that it would furnish him with one program for Monday on condition that plaintiff return the program immediately upon the expiration of its exhibition on said day and that the defendant would supply and furnish to the plaintiff a different program for Wednesday provided and on condition that he returned that program promptly and immediately after its exhibition on Wednesday, and that they would similarly supply and ship to the plaintiff a program for Saturday, subject to the same condition; but that the plaintiff declined and refused to accept the films of the defendant on the terms stated, and for that reason refused to transact any business with this defendant.

"And this defendant alleges on information and belief that the plaintiff was known throughout the motion picture industry as a "sub-renter" or "bicycler" of films and that he was commonly known in the industry as an exhibitor who would retain possession of the films delivered to him as long as possible and in violation of the

terms of his contract with the various exchanges from which he received said films.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, on the 28th day of March, A. D. 1921, there was filed in said cause, the Answer of the Enterprise Distributing Corporation, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Enterprise Distributing Corporation.)

"This defendant alleges that through its branch manager at Omaha, Nebraska, Herbert K. Moss, it supplied the plaintiff with a few programs in January, 1918 and that the plaintiff of 69 his own volition, terminated his relations with this defendant in or about the month of February, 1918, and this defendant [and this defendant] alleges that its brief business relations with the plaintiff were satisfactory, but in view of the general bad reputation of the plaintiff in the industry as a sub-renter and bicycler of films, this defendant would want to be assured of the faithful performance of any contract which the plaintiff might propose to make with the defendant before it would be willing to resume business relations with the plaintiff.

24. All matters not herein specifically admitted to be true are denied.

(Amendment to Answer of Enterprise Distributing Corporation.)

Comes now the defendant, Enterprise Distributing Corporation (the plaintiff consenting thereto) and, by way of amendment to its original answer, and as a substitute for paragraph 15 and the typewritten matter on p. 34 thereof, alleges:

1. This defendant admits and alleges that it is a corporation organized January 15, 1920, and not before. This defendant alleges that it did not at any time maintain a branch office in Omaha or elsewhere in Nebraska, and that [it] never had any business or other relations or dealings with plaintiff at Omaha or elsewhere. The exchange at Omaha, of which Herbert K. Moss was manager, was operated by the Southwestern Triangle Film Corporation, and, during all the times mentioned or referred to in the petition, such corporation was the owner of, and conducted the business of said exchange at Omaha; and, if plaintiff had any business or other dealings or transactions at any time with such exchange, those dealings or transactions were with the corporation last above mentioned and not with this defendant.

Each and all of the admissions, statements, and allegations contained in paragraph 15 and in the typewritten matter at P. 34 of the original answer of this defendant are hereby withdrawn.

Wherefore, this defendant prays that plaintiff's petition be dismissed and that this defendant go hence without day and recover its costs herein expended.

W. M. SEABURY,
JOHN J. SULLIVAN,
*Attorneys for Defendant Enterprise
Distributing Corporation.*

70 STATE OF NEBRASKA,
County of Douglas, ss:

John J. Sullivan being first duly sworn, deposes and says that he is attorney for the Enterprise Distributing Corporation, one of the defendants above named; that he has read the foregoing amendment to his original answer, and the facts therein stated are true as he verily believes.

JOHN J. SULLIVAN.

Subscribed in my presence and sworn to before me this 30th day of October, 1920.

[SEAL.]

GEORGE W. PRATT,
Notary Public.

Oct. 13, 1920. We consent to filing the above amendment.
BROWN, BAXTER & VAN DUSEN,
Attys. for Plff.

Filed Mar. 28, 1921.
R. C. HOYT,
Clerk.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of Fontenelle Feature Film Company, Incorporated, was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Fontenelle Feature Film Company, Incorporated.)

"This defendant further alleges that it never at any time transacted any business with the plaintiff and was never requested so to do except as hereinafter stated.

This defendant through its President and General Manager at Omaha, Nebraska, Max Wintraub, caused a salesman to interview the plaintiff. Plaintiff on this occasion represented that he owned a string of theatres and offered to rent certain features owned or controlled by this defendant for a gross sum to cover a rental for a specified number of days, without indicating the exact time and place at which the plaintiff proposed to exhibit the films of such company. The salesman requested the plaintiff to give an exact list of the town and the theatres and the exact time in which the films of the defendant were to be played at such places but plaintiff refused to supply such list, and as a consequence, no business was transacted between the plaintiff and this defendant.

This defendant further alleges that it is and at all times has been prepared to supply the plaintiff with films and film service upon the same terms and conditions as those upon which it supplies other exhibitors in the State of Nebraska, with such film and film service, provided only that it is reasonably assured of the faithful performance of such contract by the plaintiff, and provided the proper specification of the time and place of the proposed exhibition is duly given.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of Harry D. Graham, was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of Defendant Harry D. Graham.)

"In or about the Month of February, 1919, this defendant in behalf of the defendant Pathe Exchange, Inc., had certain dealings and transactions with the plaintiff of an unsatisfactory nature, in that plaintiff was found to be sub-letting film belonging to the defendant Pathe Exchange, Inc. in Kearney, Nebraska, without any right or authority so to do and in violation of the contracts then existing between the plaintiff and the defendant Pathe Exchange, Inc., and this defendant thereupon notified plaintiff that the defendant Pathe Exchange, Inc., would at the expiration of its existing contract with plaintiff render him no further film service and would not rent its pictures to plaintiff for exhibition at any time or place.

The plaintiff is now justly indebted to the defendant Pathe Exchange, Inc. for services rendered and for the rental of film and the sale of advertising matter in connection therewith, at his special instance and request, in the sum of \$174.55, no part of which has been paid although duly demanded, and this defendant alleges that he is unwilling to and cannot properly recommend to the defendant, Pathe Exchange, Inc., the resumption of any business dealings with plaintiff until said indebtedness is duly discharged and paid and unless the plaintiff supplies assurances satisfactory and acceptable to this defendant that any and all films belonging to Pathe Exchange Inc., rented to the plaintiff, will be exhibited only at the times and places specified in the contract therefor and returned promptly to the said Pathe Exchange Inc., as stated therein.

24. All matters not herein specifically admitted to be true are denied.

72 Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of Sidney Meyer was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Sidney Meyer.)

This defendant in behalf of defendant Fox Film Corporation had certain business dealings with the plaintiff herein which dealings were of an unsatisfactory character, in that plaintiff frequently failed and neglected, in violation of his contract with the defendant Fox Film Corporation, to return to the said Fox Film Corporation promptly the films of said company which were leased to the plaintiff and in that plaintiff refused to exhibit films contracted for on the dates contracted for, and failed generally to adhere to the term of his said contracts with the defendant Fox Film Corporation.

That about the month of June, 1919, the defendant Fox Film Corporation ceased doing business with the plaintiff, but that neither the said defendant Fox Film Corporation nor this defendant terminated their business relations with the plaintiff. The plaintiff terminated the said relations himself, and this defendant alleges that notwithstanding the unsatisfactory character of plaintiff's past transactions with the defendant Fox Film Corporation, this defendant is prepared to recommend to the said Fox Film Corporation the resumption of business dealings with the plaintiff provided and on condition only that the plaintiff [*provided and on condition only that the plaintiff*] can satisfactorily guarantee the faithful and exact performance of any contract he may propose to make with the said defendant Fox Film Corporation.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of Charles W. Taylor was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Charles W. Taylor.)

"This defendant alleges that the defendant Select Pictures Corporation began business dealings with the plaintiff about November, 1918, which business dealings were terminated by the plaintiff and not by this defendant or by the defendant Select Pictures Corporation in the month of January, 1919.

This defendant alleges that the business dealings with him and with the defendant Select Pictures Corporation were satisfactory and that this defendant and the defendant Select Pictures Corporation have at all times been and still are ready and willing to supply the plaintiff with films and film service upon substantially the same terms as those supplied to other persons within the State of Nebraska provided it is reasonably and satisfactorily assured of the faithful performance of any and all contracts so made and entered into by the plaintiff.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of Edmund J. MacIvor was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Edmund J. MacIvor.)

"This defendant further alleges that at no time, so far as he has been able to ascertain, did the plaintiff ever do business with the defendant Goldwyn Pictures Corporation.

This defendant alleges that the plaintiff solicited and requested this defendant to supply him with pictures produced by the Goldwyn Pictures Corporation for a period of approximately ten days without specifying the particular time at which such pictures were to be exhibited at a specified theatre claimed to be owned or controlled by the plaintiff, and that this defendant declined to enter into such a contract with the plaintiff, but solicited the plaintiff's business and offered to serve the plaintiff with films produced by the Goldwyn Pictures Corporation for each individual theatre claimed to be owned or operated by the plaintiff under separate contracts for each such theatre and forwarded contracts to the plaintiff in accord with this proposed arrangement, but the plaintiff failed and neglected to return said contracts to this defendant, and thereafter this defendant solicited the theatres supposed to be owned or operated by the plaintiff and endeavored to induce the person in charge thereof to accept and rent pictures produced by the defendant Goldwyn Pictures Corporation, but this defendant was unable to arrange any bookings for any such pictures and was always informed that said theatres were "booked solid."

This defendant always has been and now is prepared to supply the plaintiff with the pictures produced by the Goldwyn Pictures Corporation for exhibition upon the same terms and conditions as those upon which he supplies other exhibitors in the State of Nebraska with said pictures.

74 24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of Charles L. Peavey, was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Charles L. Peavey.)

"This defendant alleges that at various times throughout the year 1919, defendant, in the capacity of manager of the Omaha Exchange of defendant Famous Players-Lasky Corporation, had business transactions with the plaintiff, and at no time refused to furnish film or film service to theatres operated by the plaintiff upon proper, reasonable and fair terms, and this defendant at all times caused all

contracts with the plaintiff to be duly performed by defendant Famous Players-Lasky Corporation.

In September 1919, defendant solicited plaintiff's business for the ensuing season, but the terms on which the plaintiff wished to contract were not acceptable to defendant Famous Players-Lasky Corporation and the proposed contracts were rejected by it.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of Max Wintraub, was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Max Wintraub.)

"This defendant further alleges that he never at any time transacted any business with the plaintiff and was never requested so to do except as hereinafter stated.

This defendant upon one occasion caused a salesman to interview the plaintiff. Plaintiff on this occasion represented that he owned a string of houses and offered to represent certain features owned or controlled by the defendant Fontenelle Feature Film Co. for a gross sum to cover a rental for a specified number of days, without indicating the exact time and place at which the plaintiff proposed to exhibit the films of such company. The salesman requested the plaintiff to give an exact list of the town and the theatres and the exact time in which the films of the defendant Fontenelle Feature Film Co. were to be played at such places, but plaintiff refused to supply such list, and as a consequence, no business was transacted between the plaintiff and the defendant Fontenelle Feature Film Co.

This defendant further alleges that he is and at all times has been prepared to supply the plaintiff with films and film service upon the same terms and conditions as those upon which he supplies other exhibitors in the State of Nebraska, with such film and film service, provided only that he is reasonably assured of the faithful performance of such contract by the plaintiff, and provided the proper specification of the time and place of the proposed exhibition is duly given.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, 1921, the Answer of Thomas E. Delaney was filed in said Cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Thomas E. Delaney.)

"And this defendant alleges that he was never at any time solicited by the plaintiff to supply him with the films and film service of the defendant, Vitagraph, Inc., erroneously sued as Vitagraph-

Lubin-Selig-Essanay, Inc., and that he is prepared and has always been ready to recommend the defendant Vitagraph, Inc., transacted business with the plaintiff provided and on condition that he receives satisfactory guarantees and assurances from the plaintiff concerning the faithful performance of any contracts which the plaintiff may enter into with the said defendant.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answer of Herbert K. Moss was filed in said cause, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Herbert K. Moss.)

"This defendant alleges that he supplied the plaintiff with a few programs in January, 1918, and that the plaintiff of his own volition terminated his relations with the defendant Enterprise Distributing Corporation in or about the month of February, 1918, and this defendant alleges that his brief business relations with the plaintiff were satisfactory, but in view of the general bad reputation of the plaintiff

76 in the industry as a sub-renter and bicycler of films, this defendant would want to be assured of the faithful performance of any contract which the plaintiff might propose to make with the defendant Enterprise Distributing Corporation before he would be willing to recommend the making of such contract by such corporation.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, on the 28th day of March, A. D. 1921, there was filed in said cause, the Answer of Harry F. Lefholz, the Addenda thereto being as follows:

(Addenda to Answer of the Defendant Harry F. Lefholz.)

"This defendant alleges that during the period in which this defendant was branch manager for the defendant Universal Film Exchanges Inc., namely, from Feb. 1, 1920 to the present time the defendant Universal Film Exchanges, Inc., never transacted any business with the plaintiff and plaintiff was never willing to accept the films of the said Universal Film Exchanges upon the same or similar terms upon which said corporation supplied its said films to other exhibitors in the State of Nebraska.

On one occasion this defendant had an opportunity to transact business with the plaintiff, the plaintiff requesting this defendant to ship one film of the Universal Film Exchanges on Sunday for the plaintiff's use on Monday, the plaintiff asking the privilege of holding the said film until the following Sunday. This defendant advised the plaintiff that the defendant Universal Film Exchanges

would furnish him with one program for Monday on condition that plaintiff returned the program immediately upon the expiration of its exhibition on said day and that the defendant Universal Film Exchanges would supply and furnish to the plaintiff a different program for Wednesday provided and on condition that he returned that program promptly and immediately after its exhibition on Wednesday, and that they would similarly supply and ship to the plaintiff a program for Saturday, subject to the same conditions; but that plaintiff declined and refused to accept the films of the defendant Universal Film Exchanges on the terms stated, and for that reason refused to transact any business with the defendant, Universal Film Exchanges.

And this defendant alleges on information and belief that the plaintiff was known throughout the motion picture industry as a "sub-renter" or "bicycler" of films and that he was commonly known in the industry as an exhibitor who would retain possession of the films delivered to him as long as possible and in violation of the terms of his contract with the various exchanges from which he received said films.

24. All matters not herein specifically admitted to be true are denied.

Afterwards, to-wit: On the 28th day of March, A. D. 1921, the Answers of Pathe Exchange, Inc., of Nebraska, Goldwyn Pictures Corporation, First National Exhibitors Circuit, Inc. and Robertson-Cole Distributing Corporation were filed in said cause, all of them alike, the Addenda thereto being as follows:

(Addenda to Answers of the Defendants Pathe Exchange, Inc., of Nebraska, et al.)

"24. All matters not herein specifically admitted to be true are denied."

That on said 28th day of March, A. D. 1921, there was filed in said cause the answer of Samuel A. McIntyre and that the addenda contained therein is as follows:

(Addenda to Answer of the Defendant Samuel A. McIntyre.)

"This defendant alleges that he never at any time supplied the plaintiff with any pictures produced by the Metro Pictures Corporation and was never requested so to do by the plaintiff above named."

(Answer of the Defendant Omaha Film Board of Trade.)

(Filed in the U. S. District Court on April 8, 1921.)

Comes now the defendant, Omaha Film Board of Trade herein-after referred to as the "Board" and for its separate answer to the alleged cause of action set forth in the petition herein:

1. Denies that it has any knowledge or information sufficient to form a belief as to any of the matters alleged in the paragraphs of the petition marked and numbered, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 21½ except as hereinafter specifically admitted, and all of such allegations are [ther-for] denied.

78 2. This defendant admits all of the allegations of paragraph 22 of the petition except the statement contained therein that said Board was "doing business" within the State of Nebraska which allegation this defendant denies.

3. Denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the matters alleged in the paragraphs of the petition marked and numbered, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, except as hereinafter specifically admitted, and all of such allegations are therefor- denied.

4. On information and belief denies each and every allegation contained in the paragraph of the petition marked and numbered 41.

5. Denies each and every allegation contained in the paragraph of the petition marked and numbered 42, except as hereinafter specifically admitted.

6. Denies any knowledge or information sufficient to form a belief as to the truth of any of the matters alleged in the paragraph of the petition marked and numbered 43.

7. Denies each and every allegation contained in the paragraphs of the petition marked and numbered 44, 45, 46, 47, 48, 49, 50, except as hereinafter specifically admitted.

8. This defendant admits that defendant Pathé Exchange, Inc., was at the times mentioned in the petition a corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Harry D. Graham was branch manager, from about Feb. 1, 1919 to the present time.

9. This defendant admits that Famous Players-Lasky Corporation was at the times mentioned in the petition a corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Charles L. Peavey was branch manager from about March, 1919 until about February 10, 1920.

10. This defendant admits that Select Pictures Corporation was at the times mentioned in the petition a corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Charles W. Taylor was branch manager from about October 8, 1917, to the present time.

79 11. This defendant admits that Fox Film Corporation was at the times mentioned in the petition a corporation organized and existing under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Sidney Meyer was branch manager from April 19, 1918, to the present time.

12. This defendant admits that A. H. Blank, doing business under the name of the A. H. Blank Enterprises, maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant C. Earl Holah was branch manager from — to May 7, 1920.

13. This defendant admits that Vitagraph, Inc., erroneously sued herein as Vitagraph-Lubin-Selig-Essanay, Inc., was at the times mentioned in the petition a corporation organized under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Thomas E. Delaney was branch manager from November 17, 1919, to the present time.

14. This defendant admits that Universal Film Exchanges, Inc., was at the times mentioned in the petition a corporation organized under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which James H. Calvert was branch manager from Dec. 29, 1918 to Jan. 31, 1920 and the defendant Harry F. Lefholz was branch manager from Feb. 1, 1920 to the present time.

15. This defendant admits that Enterprise Distributing Corporation was at the times mentioned in the petition a corporation organized under the laws of the State of — and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Herbert K. Moss was branch manager from Oct. 10, 1919 to February 5, 1920.

16. This defendant admits that Fontenelle Feature Film Company was at the times mentioned in the petition a corporation organized under the laws of the State of Nebraska and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Max Wintraub was president and general manager from May 1, 1917 to the present time.

17. This defendant admits that Hallmark Pictures Corporation was at the times mentioned in the petition a corporation organized under the laws of the State of New York and that it maintained a branch exchange in the City of Omaha, Nebraska, of which the defendant Maude E. Larson was branch manager from December 1, 1919, to about December 8, 1919.

80 For a complete defense to each and all of the matters set forth in the plaintiff's petition this defendant alleges:

18. Between the years 1915 and 1920, the motion picture industry in the United States of America was and still is composed of three primary branches, each conducted by those known respectively as

- (a) producers, (b) distributors, also known as exchangemen, and (c) exhibitors.

(a) At all such times there were within the United States, and still are a large number of producers, entirely disassociated with any of the defendants named herein producing large quantities of desirable motion pictures all of which are available to exhibitors within the State of Nebraska. The producers of motion pictures conduct their business by acquiring the exclusive motion picture rights throughout this country and generally throughout the world in and to literary and dramatic subjects, most of which subjects are duly copyrighted in this country, and after the subject to be pictured has been reduced to scenario form, and the cast of players who are to enact various parts therein have been selected, the work of taking the pictures in the studios and elsewhere begins, and when completed the various scenes thus photographed are assembled in continuity so as to display in picture form the story of the subject so pictured.

After the negative motion picture is completed and duly assembled and titled, from forty to one hundred copies thereof are printed on positive film and wound upon reels made for that purpose, in lengths of approximately one thousand feet each. These copies are variously known as positive prints, positives, copies and prints.

Thereupon, two prints of each subject are duly entered in the office of the Registrar of Copyrights in Washington, District of Columbia, for copyright, and copyright throughout the United States is thereupon granted thereon.

(b) For the purpose of distributing the prints of such motion pictures to and causing them to be exhibited by exhibitors, the country is divided by most of the distributors into approximately twenty or more territorial districts or zones, not always embracing the same identical territories but generally embracing substantially the same, and in each zone or district those engaged in the business of distributing and renting motion pictures to exhibitors therein, maintain an office, commonly known as an exchange, within a city commonly used by those engaged in such business, as the film centre from which to distribute said films throughout such zone or district. Some of the corporate defendants herein maintain what is known as a national organization for the distribution of pictures, controlled exclusively by them, and maintain an exchange in each one of the film centres in each of the twenty zones or districts described above, while each film centre also contains one or more local exchanges, sometimes called independent exchanges, the business of which is generally confined to the particular zone or district in which the city which constitutes the film centre for that locality is situated, or to the territory adjacent thereto.

The State of Nebraska is within a zone or territory generally served with motion pictures from the City of Omaha, which is the film centre of that State.

The whole territory, so served generally, includes part of the

State of Iowa, part of the State of South Dakota, and the major part of the State of Nebraska, but the primary part of the territory is that within the State of Nebraska and the portion of the territory outside of the State is regarded as only incidental to the territory within said State. Said territory is also frequently and conveniently served from the cities of Kansas City, Missouri, Minneapolis, Minnesota, and Denver, Colorado.

The zone or territory of which the State of Nebraska is a part is known in the motion picture industry as a two per cent. territory which means that only two per cent. of the rental received from the exhibition of a picture within the United States, is derived from such zone or territory.

The invariable practice of the corporate defendants maintaining an exchange in the City of Omaha, is to deliver to such exchange from one or more points beyond the State of Nebraska, generally from two to five prints of each motion picture subject, which prints are from the date of delivery thereof at Omaha, ready to be rented to exhibitors within said State and the said prints so delivered to the exchanges at Omaha, then become and thereafter remain in consumption and mingled as much as from their nature they can be, with other property of the State and are used for repeated exhibitions therein, until the said prints are physically exhausted and of no further use for exhibition purposes.

The distributors of motion pictures acquire from the owners of the pictures, and from the owners of the United States copyright thereon, by contract, the exclusive right and authority for a specified time and within a specified territory, to distribute and to rent to motion picture exhibitors within such territory and not elsewhere, the positive prints entrusted to said distributor, and pursuant to such authority, and in the exercise of such exclusive right and privilege, which is of great value to the distributor, the distributor enters into a large number of contracts with the individual motion picture exhibitors within each zone or district as described above, for the exhibition therein of the pictures controlled by such distributor. These contracts, individually involve comparatively small rentals, ranging in the country and outlying districts in the State of Nebraska in amounts from \$1.50 to \$7.50 per reel, for the exclusive privilege of exhibiting at a specified theatre for a specified day, a particular motion picture subject and immediately after the exhibition of a picture has been concluded, the duty is uniformly imposed upon the exhibitor thereof, by contract, to return the film without delay, transportation charges prepaid, to the exchange from which he received it and if he fails in this, the time, place of exhibition and the prompt redelivery of the film, being of the essence of the agreement, serious damage to the distributor generally results, since the distributor becomes unable to fill his contracts with other exhibitors for the exhibition of the same film in other parts of the state.

And the nature of the business of the distributor is such that its success is necessarily entirely dependent upon the exact and punctual performance by the exhibitor of his contract with the distributor and upon the distributor's ability to preserve inviolate the exclusive

character of his right to cause the prints of each motion picture subject entrusted to his charge to be exhibited only under authority conferred by him as to the time and place of exhibition and the promiscuous and unauthorized exhibition of such prints would not only constitute an unlawful infringement of the copyright thereon, but would tend to destroy the business of the distributor and render him liable to respond in damage to other exhibitors with whom he had contracted for the subsequent delivery of the same film.

(c) On information and belief during the times mentioned above, there were within the United States and still are upwards of 15,000 motion picture theatres, about 665 of which are situated within the territory served from the City of Omaha, and about 341 of which are within that part of the State of Nebraska, which is served from said city. These theatres are owned, leased or operated by exhibitors, who are the primary consumers of the industry
83 and who rent the films from the distributors and exhibit the pictures thereon to the public, the ultimate consumer, for an admission fee.

Each performance lasts about two hours, and during the day and evening about six performances are usually given at each theatre. Each performance consists of the exhibition of about eight reels of motion pictures, which is approximately 8,000 feet of motion picture film, and frequently exhibitors rent from a single distributor what is sometimes described as an entire show or program, which generally consists of a drama, generally five reels in length commonly known as a feature film, and two short subjects, one of two reels in length and one of one reel.

The rental price for such entire programs throughout the State of Nebraska ranges from \$12 to \$60, depending upon the pictures which comprise any particular program, the chief elements of value being the literary or dramatic subject matter upon which the pictures are based, the popularity of the stars and actors depicted therein, the skill with which the work of production is executed, and particularly the proximity of the date of exhibition to the date upon which the picture was "released," which means the date upon which it was first available for exhibition throughout this country.

The majority of the theatres within the State of Nebraska are small and are situated in small towns not easily accessible from the City of Omaha.

During the times heretofore stated, a large number of small motion picture theatres sprang up within the State of Nebraska, especially in the country districts, some of which were conducted by men who were inexperienced in and ignorant of the business, many of whom were men of little or no means and some of whom were entirely irresponsible and had no regard for the faithful performance of their contracts and were not entitled to be trusted with possession of valuable property, such as motion picture films.

19. As the result of these conditions in the exhibiting branch of the motion picture industry within the State of Nebraska, a great number of petty, but serious abuses were practiced continuously

by the small and irresponsible exhibitor upon all the exchanges within said State.

84 Among others, the following abuses were commonly practiced:

(a) Throughout the United States, including the State of Nebraska, the rentals of films are uniformly either paid by the exhibitor in advance of the exhibition of the picture, including cost of transportation from and back to the exchange, or else the films are sent to the exhibitor pursuant to contract between the distributor and the exhibitor, collect on delivery and by contract the exhibitor is obliged to return them to the exchange, transportation charges prepaid, and this rental of the film as fixed by each exchange, is based in part upon this consideration.

Many exhibitors in the State of Nebraska frequently in violation of their contracts with the exchanges refused to accept a film with a C. O. D. tag attached, thereby breaching their contract with the exchange, subjecting it to the expense of needless transportation and causing a loss of revenue, resulting from the delayed return of the film.

(b) The exhibitors repeatedly and continually returned films to the exchanges with express and transportation charges C. O. D., thereby breaching their contract and compelling the exchange to take up and receive the film or else to go without it and by so doing render the exchange unable to perform its contract with other exhibitors for the subsequent exhibition of the same picture.

(c) Similarly, such exhibitors had no regard for the obligations of their contracts and certain illegitimate practices were commonly adopted by the irresponsible exhibitors in violation of their contracts and contrary to the obligations of fair trade, to the great loss and damage of the exchange.

An irresponsible exhibitor who received a film for exhibition at his theatre would frequently delay its return after its exhibition at his theatre and then surreptitiously deliver it to a nearby theatre for exhibition therein upon such terms as he could effect with the second exhibitor, appropriating and converting the sub-rental thus received to his own use. This illegitimate practice is known in the trade as "bicycling," and is most serious and damaging in its consequences to the exchange, due to the fact that it deprives the exchange of the opportunity to rent the picture to the so-called second exhibitor and other exhibitors in the same vicinity, it constitutes an infringement of the copyright of the subject thus exhibited and the delay occasioned by the unauthorized use of the film by the exhibitor, commonly prevents the exchange from performing its contracts for its subsequent exhibition with other exhibitors. Again, such an exhibitor frequently exhibited a picture in his own theatre on additional days not included in his contract and without compensating the distributor therefor.

(d) Frequently either as the result of ignorance on the part of the exhibitor or gross carelessness in the adjustment of the exhibitor's

projection machine, the film of the distributor is torn, mutilated and damaged, and the exhibitor commonly refused to make any adjustment thereof and the distributor was left without redress.

(e) Notwithstanding the fact that the business between an exchange and the exhibitor is regarded as a cash business, frequently the exhibitor becomes indebted to the exchange through practices similar to the following:

Frequently when a C. O. D. shipment of film is presented by the express company to the exhibitor for delivery the exhibitor telephones or telegraphs the exchange, stating that his check in payment of the advance rental is in the mail and has been delayed through no fault of his and requests the exchange to telegraph the express agent to release the film to the exhibitor without the payment of the C. O. D. Thereupon when the exchange complies, no check appears and suit must be brought to recover the rental.

On other occasions the check arrives and when deposited comes back, marked insufficient funds and sometimes payment stopped by the exhibitor.

(f) Exhibitors have frequently been known to replevin films sent to them C. O. D. by claiming a temporary property right therein, thereby avoiding payment of the C. O. D. charge and such exhibitors then exhibit the picture and refuse to pay the rental.

(g) Such an exhibitor has also accepted a delivery of film under his contract and paid the rental and exhibited the picture and then telegraphed the exchange that he would hold the film until the exchange returned to him the rental he had just paid.

(h) In other instances an exhibitor paid the rental on a film C. O. D. After paying for the film he persuaded the express agent not to return the money to the exchange immediately and while payment was thus delayed the exhibitor swore out an attachment claiming a purely fictitious breach of contract and attached the money he had just paid.

86 In each of the foregoing instances the amount involved was only a comparatively few dollars and the exhibitors indulging in such unfair practices well knew the fact to be that it would cost more to collect the damages they thus occasioned the exchange, through judicial process, if collectable at all by such means, than was involved in the entire transaction and so the abuses continued to grow unchecked until the cumulative effect of such abuses became extremely burdensome to the exchanges and occasioned the exchanges great and serious loss and damage.

In addition to the foregoing abuses in the trade and largely because thereof disputes arose from time to time and were apt to continue to arise, not only between the exhibitors and the exchanges which disputes tended to promote strife and ill feeling between these two separate branches of the industry, but between the large number of persons employed in each such branch and their respective employers, and repeated complaints were received by the exchanges from reputable exhibitors protesting against the unfair and dishonest

practices of the irresponsible exhibitors which seriously prejudiced all exhibitors.

Besides the foregoing evils and abuses from which the trade was suffering, matters relating to the transportation and prompt, delivery of films by the express companies and through the mails, the establishment of proper police regulations for the suppression of the exhibition of improper films, and the adoption of fire regulations promoting the safety and welfare of the public constantly arose and required the establishment of some organization, Chamber of Commerce, Association, Clearing House, Board of Trade or body which would undertake the work of bettering and improving industrial conditions without the hope of profit or pecuniary reward.

20. To correct and to relieve the industry from the abuses existing in the trade within the State of Nebraska and particularly those abuses specified herein, to facilitate the exchange of trade information as to available unemployed labor and other subjects of trade interest and to adjust disputes, on or about April 12, 1919, the Omaha Film Board of Trade was duly organized and incorporated under the laws of the State of Nebraska.

The defendants Harry D. Graham, Charles W. Taylor and Sidney Meyer were incorporators of said Board of Trade.

87

Officers and Directors.

At the incorporation of the Omaha Film Board of Trade, April 12, 1919, the following were elected officers and served as stated below:

President, Harry D. Graham, from April 12, 1919, until annual meeting December 22, 1919.

Vice-President, Charles W. Taylor, from April 12, 1919, until annual meeting December 22, 1919.

Secretary, Sidney Meyer, from April 12, 1919, until September 1, 1919, when he was succeeded by Samuel A. McIntyre, who served till November 17, 1919, when he was succeeded by Thomas E. Delaney, the present secretary.

Treasurer, W. N. Skirboll, from April 12, 1919, until June 8, 1919, when he was succeeded by L. A. Getzler, who in turn was succeeded by Samuel A. McIntyre on November 17, 1919, the present treasurer.

Assistant Secretary, W. F. Coleman, from April 12, 1919, till about October 1, 1919.

Directors.

From April 12, 1919, until annual meeting December 22 1919, Harry D. Graham, Charles W. Taylor, W. N. Skirboll, Sidney Meyer, C. Earl Holah.

All served until annual meeting except W. N. Skirboll, who resigned on June 8, 1919.

The vacancy was not filled until October 24, 1919, when Samuel A. McIntyre was elected to take his place.

Officers Elected at Annual Meeting December 22, 1919, and Present Officers.

President, C. Earl Holah, served until May 7, 1920; resigned on that date, Sidney Meyer, elected President.

Vice-President, Charles L. Peavey, served from December 22, 1919, until on or about February 10, 1920; succeeded on February 16, 1920, by Charles W. Taylor, present Vice-President.

Secretary, Thomas E. Delaney, present Secretary.

Treasurer, Samuel A. McIntyre, present Treasurer.

88 Directors Elected at Annual Meeting December 22, 1919, and Present Directors.

Max Wintraub, Sidney Meyer, Charles W. Taylor.

Charles L. Peavey who resigned on February 10, 1920.

C. Earl Holah who resigned on May 7, 1920.

New directors have not been elected to take their places.

The following defendants were members of the said Board of Trade and so remained as herein after stated:

Name.	Member from—
Harry D. Graham.....	April 12, 1919, and still is a member.
Sidney Meyer.....	April 12, 1919, and still is a member.
William F. Coleman.....	
Charles W. Taylor.....	April 12, 1919, and still is a member.
James H. Calvert.....	April 12, 1919, and remained a member until February 1, 1920.
Samuel A. McIntyre.....	June 10, 1919, and still is a member.
Edmund J. MacIvor.....	About Aug. 1, 1919, and still is a member.
Charles L. Peavey.....	Apr. 12, 1919, until Feb. 9, 1920, and from March 16, 1920, and still is a member.
Elmer J. Tilton.....	
Maude E. Larson.....	Dec. 1, 1919, until — — — — —.
Thomas E. Delaney.....	Nov. 17, 1919, and still is a member.
John J. Milstein.....	
Herbert K. Moss.....	Dec. 1, 1919, until Feb. 5, 1920.
Harry F. Lefholz.....	Feb. 1, 1920, and still is a member.
C. Earl Holah.....	April 12, 1919, resigned May 7, 1920.
Max Wintraub.....	April 12, 1919, and still is a member.

The purposes and objects for which said Board was formed were as stated in Article III of the Articles of Association of said Board, in part as follows:

"Article III.

The general nature of the business shall be to promote acquaintanceship and good will amongst those engaged in the film and picture business; to promote the interest and elevate the standard of the

motion picture and film picture in this section of the country; to acquire and disseminate valuable business information and maintain and operate a trade and information bureau and exchange for the collection and supplying of information relative to the motion picture and film industry, including the credit and standing of firms, corporations and individuals, as to available unemployed labor, and as to other subjects of trade interest; to adjust controversies and business disputes among those engaged in the motion picture business; to align the film business with the other forces or activities of the community tending towards the community's advancement, patriotism, intelligence and good citizenship."

Said Board was organized, instituted and actually operated solely for the mutual help and benefit of the members who were all employed and engaged in the industry and to carry out and effectuate by lawful means, the lawful purposes and objects above set forth.

While said Board had shares of capital stock, such stock was merely nominal and was, by the provisions of the Articles of Association, stripped of any possible attribute or incident of commercial value by being made non-transferable, except upon conditions which rendered the nominal stock nothing but a certificate of membership in said Board of Trade. Said Board was not organized, operated or conducted for financial gain or profit and no financial profit or gain to anyone resulted from its operation. It was not organized to engage in any branch of the motion picture business, and did not engage in any branch thereof and transacted no business of any kind or character.

It owned no motion picture film or any other commodity of trade or commerce. It never at any time assumed or attempted to fix the price to be charged as the rental of any films received by its members or others, and it never did any act or thing which either did or could tend to monopolize, in whole or in part, trade or commerce among the several states or to restrain such trade or to restrict competition therein.

And the membership in said Board was at all times open, free and unrestricted to those employed in any branch of the industry. As a means of effecting its lawful objects and purposes, immediately upon its incorporation, the following by-laws and rules, among others, were adopted by its members.

"Article XXI.

1. That for the purpose of defending its members against imposition, wrongful failure to lift *O. C. D.* shipments of films, the taking of unfair advantage of film service, etc., the Corporation may establish in the office of the Secretary of the Board a clearing house of protective information.

2. That any such information on file with the Secretary desired by any member of the Corporation in good standing shall, on request, be furnished free of charge.

3. That when any acts against which it is the purpose of the Corporation to protect its members, as hereinbefore stated, come to the attention of any member of the Corporation they shall be reported immediately in writing, on forms furnished the members, to the Secretary of the Corporation. This information is to be sent immediately to the members of the Board of Trade.

4. That the members of the Board shall keep the Secretary informed of any developments in any case previously reported to him and shall report the final disposition of the case.

6. That it shall be the duty of the Secretary to write every party committing said acts, and so reported to him, requesting said party to state his reasons for such action.

7. That each member of the Board, shall, on request, furnish to the Secretary, in connection with the said purposes, such information regarding existing and prospective accounts as may be requested by him.

8. That all information furnished to any member of the Corporation is for his use solely to protect him against said practices and to aid him in determining the propriety of extending credit or the value and condition of an existing credit, and shall be held in strict confidence and not revealed by him to the person reported nor to any other person.

9. That irrespective of the wishes or request of other members of the Corporation each member thereof shall be free to refuse or grant credit to any person.

10. That all expenses incident to the obtaining and furnishing of regular credit information shall be paid by the Corporation.

11. That all expenses incident to the obtaining of information requiring special investigation shall be, in each case, paid by the members or members requesting same."

Also the following trade rules or standards of honest and fair business dealings between the said two branches of the industry were duly adopted by the Board:

91 "Omaha Film Board of Trade (Inc.)

The Omaha Film Board of Trade is an organization formed primarily to solve the common problems of exchanges and exhibitors, and to adjust all complaints made by, or against the various exchanges and exhibitors. The Board is organized to protect both the exhibitor and the exchange. The Board wishes all exhibitors to file complaints whenever they feel that they have been unjustly treated by exchanges.

Permit me to call particular attention to Rule No. 2, covering payments for film rental. Since contracts invariably call for cash in advance, and since express company remittances for C. O. D.'s

have been very unsatisfactory and slow, we urge every exhibitor to spare himself and the exchange much annoyance by remitting amply in advance to eliminate the necessity of a C. O. D. We realize that there arise occasional circumstances where a C. O. D. cannot be avoided, and it is therefore the intent of Rule No. 2 to ship C. O. D. only where remittance in advance has been practically impossible.

Our only desire in adopting these rules is to play equally fair with all exhibitors, as the majority are already complying with them.

We thank you in advance for your co-operation in this matter, and assure you that a strict compliance therewith will make the exchange service to you much more efficient, since it will automatically eliminate practically all conditions that have prevented our giving you 100 per cent. service in the past.

Trade Rules.

Five trade rules, to take effect May 20th, 1919, have been adopted by the Board, as follows:

1.

Transportation Charges: All transportation charges to and from the exchange must be paid by the exhibitor.

2.

Payments: (A) Since the film business is necessarily a cash business, payments for film rentals must be made cash in advance, or all shipments will be made C. O. D. No credit will be extended to any exhibitor. Should any exhibitor refuse a C. O. D. he shall not, in the future, be accorded privilege of further C. O. D. shipments, but shall be furnished film only, providing film rental is received in advance of shipment. In the event that check is received by the exchange after C. O. D. shipment has gone forward, the C. O. D. will not be released, but the check will be returned or applied on other service at the discretion of the exchange.

(B) Payments for advertising matter will be made according to the regulations of the individual exchanges.

3.

Contracts: The exhibitor must carry out all terms as specified in the contracts made with the exchanges. No verbal agreement will be recognized. Exhibitors are cautioned to read carefully all terms of the contracts signed.

4.

Change in Booking: In the event any exhibitor desires to change play dates of any films from those originally booked, or contracted, exhibitor must pay for such films before original play dates with

the understanding that he has the privilege of playing films without extra charge at some time other than the regular contracted play dates with that exchange, subject to the films be open for the substituted dates on the records of exchange.

5.

Holding Film: No film shall be held by the exhibitor beyond play dates as per contract. And all damage accruing to the exchange or the brother exhibitor through disregard of this rule shall be borne by the exhibitor responsible."

21. As a means of enforcing these rules for the good of the industry as a whole, within the State of Nebraska, said Board adopted a system whereby when informed of any unfair, dishonest, or illegal practice on the part of an exhibitor or exchange man, the following procedure would be adopted:

Upon the making of a charge against any such person, due notice thereof would be given the accused, and an opportunity to be heard, to explain and to defend would be afforded. If the Board of Directors of said Board concluded after full investigation and hearing that the accused had been guilty of the unfair, dishonest or illegal practices charged, contrary to the best interests of the trade, and particularly if the accused had been guilty of any of the offenses above set forth, the said Board of Directors would so decide and thereupon would cause the name of the accused so found to be guilty of such offenses to be placed upon a blue card, which card would be sent to each member of this defendant, to indicate that the said Board of Trade regarded the accused as a person no longer in good standing in said trade.

93 The members of the said Board of Trade had the right to follow their own business judgment and inclination as to whether thereafter they wished to deal with any person whose name had been placed upon a blue card in the manner specified.

There were no fines or penalties imposed upon any member who wished to and who did deal with any such person.

There was no agreed concert of action against any such person and so soon as such person purged himself of such offense by assurances of proper conduct in the future his name was immediately placed upon a white card and similarly sent to each member of the Board of Trade, and thereafter, as theretofore, the individual members of said Board might deal with such person or not as he might determine for himself.

22. On information and belief, between the years 1915 and 1920, the plaintiff knowing full well the many abuses which existed in the exhibiting branch of the industry in the State of Nebraska and the great opportunity which that branch of the industry presented for profit and gain resulting from unfair, dishonest and illegal practices in connection therewith, began to rent films from various distributors of motion pictures in the City of Omaha, some of whom are de-

defendants herein, for exhibition by him within the State of Nebraska, and plaintiff represented to said distributors and caused them to believe that their said pictures would be exhibited only in theatres owned or actually operated by him.

The said distributors, relying upon said representations and believing them to be true, entered into written contracts with the plaintiff for the exhibition of their said motion pictures at the times and places definitely stated in each of said contracts, in all of which contracts the said plaintiff agreed on his part not to subrent or permit the exhibition of the said pictures at any other time or place except as therein stated.

With the contracts of one or more of the corporate defendants assuring plaintiff a continuous supply of films which he was authorized to exhibit in about five of the theatres of which he claimed to be proprietor, at the times stated in said contracts, the said plaintiff established relations with the proprietors of about twenty motion picture theatres, most of which were located in the south central part of the State of Nebraska, and undertook and agreed with them to procure motion picture films for exhibition in said motion picture theatres in consideration of the agreement of the proprietors of said theatres to pay to him, the plaintiff, a rental therefor.

94 After the plaintiff had established his said relations with said exhibitors he proceeded, in violation of the terms of the said contracts with said defendants and without any right or authority so to do, and without the knowledge or consent of any of the defendants, to cause said pictures to be exhibited in approximately twenty of the said motion picture theatres which constituted his alleged circuit and received and derived from the exhibition of the said pictures substantial sums of money from the proprietors of said theatres, all of which he appropriated and converted to his own use. In this manner he rented pictures from some of the corporate defendants for exhibition in five towns and unlawfully caused them to be exhibited in about twenty towns, retaining and converting the rentals to his own use.

On information and belief, as a further means of conducting his unfair, dishonest and illegal practices, plaintiff in several instances attempted to justify his retention of a film for a longer period of time than that authorized in his contract with the distributor, by pretending that his copy of such contract authorized him so to retain it.

These contracts are executed in triplicate and one copy is sent to the home office of the distributor, one is retained by the branch manager, and one is delivered to the exhibitor.

If the contract as signed and accepted by the distributor required the plaintiff to return the film not later than 10 days after its receipt by him, the copy of the contract retained by the plaintiff would be changed to allow him more than 10 days in which to return said film, and during all of the time the film remained in the plaintiff's possession he caused it to be exhibited for his own account and profit as frequently as possible, and this defendant alleges on information and belief that whenever the copy of the contract produced

by the plaintiff differs from the copies thereof sent to the home office, either the plaintiff himself altered the contract after its execution and transmission to the home office or he corruptly procured its change and alteration to be made without the knowledge or consent of the distributor.

By the unfair, dishonest and unlawful means described above, and other similar means, the plaintiff built up his said business and obtained complete control and dominion over the exhibitors of the small theatres comprising his alleged circuit and by threats, that if any of said exhibitors rented films from anyone other than the plaintiff, he, the plaintiff, would not longer serve him with any

95 films whatever, the said plaintiff attempted to and did completely monopolize a part of the trade and commerce within the State of Nebraska, namely, the business of renting motion picture films to all of the exhibitors thereof in south central part of said State, in violation of Section 4046 and succeeding sections of the Revised Statutes of the State of Nebraska for the year 1913, and contrary to the established usages and customs of fair trade within said state and elsewhere throughout the United States. And defendant further alleges on information and belief, that at all times during the year 1919 the plaintiff's general and common reputation in the motion picture industry in the State of Nebraska for unfair trade and practices therein was bad, and that he was generally regarded as an undesirable and unreliable renter of motion picture films, with whom it was unsafe to transact business.

23. On or about July 7, 1919, a complaint was made to the said Board of Trade by the Sterling Film Corporation, a Nebraska corporation, against the plaintiff, charging in substance that a film belonging to said compay, entitled, "A ... Tramp," had been sent to plaintiff at Minden, Nebraska, through error, on or about June 8, 1919, and was retained by him until on or about June 20, 1919, at which time he returned it to the Sterling Company from Franklin, Neb.

Plaintiff was duly notified of the charge, corresponded with the Board concerning it, and failed to appear to discuss it in person with the Board when requested so to do.

The attempted explanation presented by the plaintiff in his correspondence was unsatisfactory and failed to explain the charge against him, and after complete investigation of the facts and ample opportunity to plaintiff to appear and defend and after receiving his written attempted explanation, the Board decided upon all the facts that the retention of the film was unjustifiable and thereupon the plaintiff's name was entered upon one of the blue cards of the said Board kept for such purposes and sent by it to its members, thereby indicating that the plaintiff was not regarded by said Board as an exhibitor in good standing in the industry.

On or about October 6, 1919, the Board decided to reinstate the plaintiff as an exhibitor in good standing with its members as to the towns Alma, Franklin, Minden, Bloomington and Blue Hill, Nebraska, in which plaintiff represented he owned or operated theatres,

and pursuant to this decision the Board caused a white card with the name of the plaintiff thereon to be sent to all members of the Board.

96 About November 4, 1919, Defendant H. D. Graham charged plaintiff in substance with the unauthorized exhibition at a motion picture theatre at Kearney, Nebraska, of a film owned or controlled exclusively by defendant Pathe Exchange Inc., and about November 7, 1919, the defendant Maude Larson charged that plaintiff had detained a number of films returnable to the defendant Hallmark Company from 5 to 10 days beyond the time and period allowed by contract for their retention.

Thereafter plaintiff was notified by said Board that there would be a hearing on said charges and he was requested to appear and offer any explanation or defense thereto he might have. Plaintiff appeared at the hearing on or about November 13, 1919, and the charges were proved and admitted by plaintiff to be true, and thereupon the Board issued a blue card and forwarded the information conveyed thereby to its members, namely, that the said plaintiff was no longer regarded by said Board and its Board of Directors as an exhibitor in good standing in the industry.

This defendant denies that any false charges were brought before it against plaintiff by its members and denies that plaintiff had no knowledge of the charges against him, and denies that he was given no opportunity to be heard. Defendant admits that the persons alleged to have been present at this meeting in paragraph 45 of plaintiff's petition were present thereat and that the members of the Board of Trade then present stated the terms upon which in their judgment the Board would be justified in advising its members that the plaintiff was entitled to be regarded as reinstated as an exhibitor in good standing in said industry, but plaintiff declined to accept or comply with such conditions, in consequence of which no change was made in the decision of the Board that the plaintiff's name was properly and justly placed upon its so-called blue card list and allowed to remain thereon.

On information and belief, that one or more of the corporate defendants, after receiving the information above described from the said Board of Trade, concluded their business relations with the plaintiff, pursuant to the right so to do reserved in their written contracts with the plaintiff, and ceased to supply him with films or film service, and thereafter one or more of the corporate defendants declined to rent the plaintiff any more pictures or furnish him any more service in connection therewith, but this was a matter of individual business judgment and inclination in each case and was not regulated or controlled by said Board or by concerted action of its members, and heretofore and long prior to the formation of the defendant Board of Trade several of the corporate defendants ceased to supply the plaintiff with films, not only because of their individual disinclination so to do, but at the express request of the plaintiff.

This defendant further alleges on information and belief that in or about the months of July and August, 1919, the plaintiff had subsisting contracts with only three of the corporate defendants, namely, the Pathé Exchange, Inc., the Famous Players-Lasky Corporation and the defendant A. H. Blank, through whom the right to exhibit the pictures of the defendant First National Exhibitors Circuit was and is obtainable, and this defendant alleges on information and belief that at no time since July, 1919, or at any other time has there been any difficulty on plaintiff's part in obtaining film service from a substantial number of the corporate defendants herein and from other producers and distributors of motion pictures who are not members of said Board of Trade or in any way connected or affiliated therewith or with any of the defendants herein, and this defendant alleges on information and belief that the plaintiff is still continuing to operate secretly one or more of the theatres claimed to be owned by him and that if, as he alleges, he has lost the business of the theatre proprietors constituting his alleged circuit, such loss of business results from natural causes, to wit, because such theatre proprietors are no longer restrained, coerced or influenced by the threats of the plaintiff as hereinbefore alleged because said exhibitors can now obtain the lawful right to exhibit the subjects controlled by the defendants from each corporate defendant separately and because the evil and unlawful influence of the plaintiff among the said exhibitors constituting his alleged circuit has been removed not by any act of any of the defendants herein, but by the said exhibitors themselves breaking the bonds of monopoly by which plaintiff controlled them, and by re-establishing the active competition among themselves which the unlawful and monopolistic activities of the plaintiff in South Central Nebraska had for a time suspended and restrained, as aforesaid. And this defendant further alleges that this action is not brought and is not maintained by the plaintiff in good faith and that its institution and maintenance is an effort on the part of the plaintiff to capitalize and recover from the defendants three times the amount of the losses plaintiff claims to have sustained, although said

98 losses, if any, resulted as heretofore stated from natural causes and from the plaintiff's inability to continue to conduct an illegitimate business for a further period of time at a profit.

And this defendant further alleges that the information communicated by said Board of Trade as aforesaid to its members of and concerning the plaintiff was privileged in that it was based upon information derived from sources deemed by it to be accurate and reliable and was nothing more than the confidential report of a credit or mercantile agency to its members, rating one of their customers, and was transmitted in the usual course of its operations without malice toward the plaintiff and without any purpose or intent to injure or impair any lawful business in which the plaintiff might be engaged, and that such communication was made by said defendant in good faith, with good motives and for justifiable ends, namely, for the protection of its members and to improve and better trade conditions, and to correct the evils and abuses affecting the motion picture industry above described.

That the acts of the defendant Board of Trade were lawfully done in good faith, pursuant to its lawful purposes and objects, without intent to restrain and actually without exerting any restraint upon or monopoly or attempted monopoly of any part of the trade or commerce among the several states and without any actual injury of any kind or character to the plaintiff above named.

And this defendant further alleges that the contracts between the corporate defendants and this plaintiff, while in full force and effect, required such defendants to perform for the plaintiff work, labor and services in furnishing and delivering to the plaintiff the films for exhibition and the advertising material incidental thereto, and that each of such defendants singly or in concert had the right to terminate such relation of employment in accord with their said contracts and to cease to perform such work and labor and to recommend, advise and persuade others so to do and to attend at any place for the purpose of obtaining information from and of communicating information to each other, and that each and all of the acts of the defendants and each of them were lawful acts and none of them violated or tended to violate any provision of any of the Anti-Trust Acts or any other laws enacted by the Congress of the United States.

And this defendant expressly sets up and claims the rights, privileges and immunities resulting, separately and conjunctively, from Section 6 and Section 20 of the Act of Congress, approved October 15, 1914, commonly known as the Clayton Act, for its own benefit and for the benefit of its officers, directors and members.

24. All matters not herein specifically admitted to be true are denied.

Wherefore, defendant prays that the plaintiff's petition be dismissed and that the defendant go hence with its costs herein expended.

EUGENE N. BLAZER,

206 Bee Building, Omaha, Nebraska,

Attorney for the Defendant Omaha Film Board of Trade.

STATE OF NEBRASKA,

County of Douglas, ss:

Eugene N. Blazer, being first duly sworn, deposes and says that he is attorney of the Omaha Film Board of Trade, a corporation, one of the defendants above named; that he has read the foregoing answer, and the facts therein stated are true as he verily believes.

EUGENE N. BLAZER.

Subscribed in my presence and sworn to before me this 28th day of March, 1921.

[Notarial Seal.]

E. H. MCCARTHY,

Notary Public.

Endorsed: Filed Apr. 8, 1921. R. C. Hoyt, Clerk.

(Reply to Answers of Defendants.)

(Filed in the U. S. District Court on April 18, 1921.)

Comes now the plaintiff and for his reply to the answers filed herein by each and every of the defendants herein denies each and every allegation therein contained except such as admit the truth of the allegations contained in plaintiff's petition.

Wherefore plaintiff asks for judgment as in his petition prayed.

C. P. ANDERBERY AND
BROWN, BAXTER & VAN DUSEN,
Attorneys for Plaintiff.

100 UNITED STATES OF AMERICA,
State of Nebraska,
County of Douglas, ss:

Charles G. Binderup being first duly sworn on oath says that he is plaintiff herein; that he has read the foregoing reply and knows the contents thereof and the same are true as he verily believes.

CHARLES G. BINDERUP.

Subscribed in my presence and sworn to before me this 18 day of April, 1921.

ANNA L. HOWLAND,
Notary Public.

Endorsed: Filed Apr. 18, 1921. R. C. Hoyt, Clerk.

(Jury Impaneled; Trial April 18, 1921.)

April Term, 1921.

Before Judge Woodrough.

It is Ordered, by the Court, that leave be, and the same is hereby given to file reply herein, instanter. And leave is granted plaintiff to amend Paragraph No. 44, of the Petition filed herein, by interlineation, at the end of Line (9), of said Paragraph to which the defendants except.

Said cause came on regularly for trial, the plaintiff appearing by Brown, Baxter & Van Dusen, and C. P. Anderbery, his attorneys, and the defendants by their attorneys, John J. Sullivan, Arthur Mullen, Eugene N. Blazer, W. M. Seabury, Austin C. Keough and Spike W. Whittaker; also, came the following named persons as jurors to try said cause, to-wit:

Arthur Shaw,
Fred Balster,
Chas. A. Gall,
James J. Byrne,

D. W. Hoch,
William Machlen,
William Karth,
Gust Sedin,

K. A. Peterson,
William Kieck,
R. S. Humason,
Thomas L. Hartford.

who are duly empaneled and sworn to try said cause. Thereupon the opening statement of plaintiff is made to Jury, and at the conclusion thereof the defendants, in open Court, moved the Court for a directed verdict on the petition and said statement. Thereupon, said motion came on for argument to the Court, and said cause not being concluded at the hour of adjournment, further proceedings herein are adjourned until tomorrow morning.

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(*Trial April 19, 1921.*)

April Term, 1921.

Before Judge Woodrough.

This day, again came the parties hereto by their respective attorneys, also came the jury heretofore duly empaneled and sworn to try said cause. Further arguments are made upon the motion to direct a verdict, and said cause not being concluded at the hour of adjournment, further proceedings herein are adjourned until tomorrow morning.

(*Trial, April 20, 1921; Plaintiff Granted Leave to Amend Complaint; Verdict, and Judgment.*)

April Term, 1921.

Before Judge Woodrough.

No. 850. Law.

CHARLES G. BINDERUP

vs.

PATHE EXCHANGE, INC., et al.

This day, this cause came on for further hearing upon the motion of the defendants to direct a verdict, and the argument was continued; and the Court

Ordered that leave be and the same is hereby given plaintiff to amend his petition, as follows: by attaching amendment to paragraph 21½; also by attaching amendments to paragraphs 40½ and 42½; also, by attaching [amentment] in lieu of amendment attached to paragraph 44; also, by attaching amendment to paragraph 44, at line 22 of page 14 of said petition; to all of which the defendants except. And the Court after hearing the arguments of Counsel for the parties hereto upon motion to direct a verdict, and being fully advised in the premises,

Ordered, that the motion of defendant for a directed verdict be, and the same is hereby, sustained; to which the plaintiff excepts. Said verdict was duly returned and is in the words and figures following, to-wit:

"Verdict for Defendants.

United States District Court, District of Nebraska, Omaha Division.

850. Law.

CHARLES G. BINDERUP, Plaintiff,

VS.

PATHE EXCHANGE et al., Defendants.

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Verdict.

We, the jury in the above entitled cause, find in favor of the defendants therein.

Dated this 20th day of April 1921.

WILLIAM KARTH,
Foreman."

Filed Apr. 20, 1921.
R. C. HOYT,
Clerk.

(Judgment.)

It is ordered, by the Court, that the defendants, Pathe Exchange, Inc., et al., do have and recover of and from the plaintiff, Charles G. Binderup their costs in the above entitled cause, as to the verdict herein, and that the defendants have execution therefor.

(Bill of Exceptions.)

(Filed in the U. S. District Court on June 11, 1921.)

Be It Remembered, that on the 18th day of April, A. D. 1921, at the regular April Term of the District Court of the United States, for the District of Nebraska, Omaha, Division, Honorable J. W. Woodrough, Judge, presiding, the above entitled case was called for trial and a jury impaneled and sworn therein, and the trial commenced and continued to and on the 20 day of April, A. D. 1921; Norris Brown, Esq., Irving F. Baxter, Esq., Dana B. Van Dusen, Esq. and C. P. Anderbery, Esq., appearing for the plaintiff; John J. Sullivan, Esq., William F. Seabury, Esq., Arthur F. Mullen, Esq. and Eugene Blazer, Esq. appearing for defendants; at which trial proceedings were had as follows, that is to say:

Judge Baxter: May it Please the Court and Gentlemen of the Jury:

On the 12th and 13th days of November, 1919, Mr. Binderup, the plaintiff in this case, was the owner of some, and the operator or interested in the operation of, all, of 28 moving picture theatres in the State of Nebraska, at points which I will more particularly state to you later on. Some of these theatres—some of these 28—he owned outright, five of them I believe the evidence will disclose, and the remainder of them he selected and furnished for their use and exhibition pictures from day to day.

103 On the 14th day of November, 1919, the following day from the period to which I am referring, he was in Omaha and became appraised of the fact that he was through; that he could have no pictures at those 28 theatres; that the contracts which he held were so much waste paper; that an income which he had enjoyed had vanished in the air; that his theatres had to close; that he could neither have pictures at his own theatres nor supply those other theatres which he had engaged to supply with picture films selected by him and which he was to deliver from time to time for those people. From a man enjoying upon the 13th day of November, 1919, as the evidence will disclose, a very nice income from his business, the evidence will disclose that he had no income therefrom on the 14th day of November, 1919, and has not had since, all due, as the evidence will disclose, to the acts of defendants in this case.

Now, in order to more particularize and to give you gentlemen an understanding of the testimony as it is offered upon the stand, so that you may listen to it and receive it understandingly I will read from our petition, as the defendants will read from their answer, so that you will know what the plaintiff [*excepts*] to prove by his witnesses called to testify in this case either by deposition or upon the stand. The plaintiff in this case, Mr. Binderup, who sits there (indicating) lives and has lived for a great many years in Minden, Nebraska. In 1911 he first started a picture show at that place, owned by him, and the building was owned by him, and he conducted the business for awhile. Then he leased it and his lessee conducted the business for awhile, then he took it back and continued it for awhile, then he leased it again. He found that the income from the operation as the evidence will disclose was insufficient; that it did not pay him to conduct it at Minden, Nebraska, in one theatre, and it was being conducted by him and his lessees at a loss. So he came to Omaha to learn something about the picture show business and spent many days here calling upon these defendants and their branch managers here, and he ascertained that there was such a thing as a line or chain or circuit of theatres in various parts of the country that were being profitably conducted, and that the persons operating the line or chain or circuit of theatres had the advantage of a lower price and had the advantage of saving in many ways overhead charges, express charges, and other charges in connection with the business, which of itself made a very respectable profit. So he talked with one of the defendants in this case, their representative here in Omaha, and was urged by this representative to take on other theatres, and inducements were held out to him to do that, that is, he could show the picture that they gave him in those other theatres and have a free show in his own theatre of the

same picture, that is, free of cost, as an inducement to him, because they said, "that part of the country where you are is far away from the center here in Omaha and there is very little business done out there, whereas a good deal might be done," and they urged him and offered him various inducements to enter into this sort of an arrangement and he was persuaded to do so, commencing in a small way and gradually adding to the number of theatres which he had until he built up what was known as the Binderup circuit out there in the State of Nebraska, at Minden, McCook, Arapahoe, Bloomington, Upland, Blue Hill, and a number of other places, built up quite a profitable business, and as I say, that was gradually done at his own expense. He would go out and go over this territory and from time to time would add these new shows to his chain or circuit of theatres. Now, so you will understand the extent of this circuit, in addition to the theatre which he had at Minden, part of the time operated personally and part of the time leasing it to some one to whom he furnished the films under this sort of an agreement, these films being selected by him with a view to serving the public with the best possible films both as to morality and interest and the kind of pictures that the good people of the communities throughout the towns on his circuit desired to see. The first theatre, I believe, that he established outside of Minden was at Upland, in Franklin County, Nebraska, then at Blue Hill in Webster County, then at Alma in Harlan County, then at Franklin in Franklin county. Those were his own theatres, the business conducted by him all through the time that I have been talking about and down to the 14th day of November, 1919, and also as a lessee of a moving picture theatre at Bloomington in Franklin County, he did not own that but he leased it and operated it. During the said five years last past he was also engaged in the business of selecting and distributing to a circuit of moving picture theatres commonly known as "The Binderup Circuit," programs consisting of moving picture films and advertising matter accompanying the same, through an agreement entered into between himself and the parties operating said moving picture theatres at the following named places, all within the State of Nebraska: Kenesaw in Adams County, Axtell in Kearney County, Oxford, Edison, Arapahoe, Holbrook and Cambridge, all in Furnas County, Bartley in Red Willow County, Orleans in Harlan County, McCook in Red Willow County, Stamford and Beaver City in Furnas County, Bladen in Webster County, Wilsonville in Furnas County, Campbell and Hildreth in Franklin County, Wilcox in

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Kearney County, Ragan in Harlan County, Holstein in Adams County, Clay Center and Fairfield in Clay County, and in addition thereto he selected, distributed and supplied with programs, consisting of moving picture films and advertising matter, the houses leased or owned by himself as hereinbefore named.

Now the evidence and the testimony of witnesses will refer to programs—that they ran a program. That means that it consisted of the film itself, which was shown upon the screen and the advertising matter which accompanied this film, and which was placed

before the theatre or scattered around and posted in the form of posters several days before the picture itself was shown. Now, all of you probably who have gone to a moving picture theatre or passed one have seen out in front flaring placards, posters and pictures, some in frames and some not, some upon the walls and some standing around and posted up in various places, an advertisement that at such a theatre there would be shown such a picture upon such and such a night. Those comprised the advertising matter which he procured from the defendants and in turn furnished along with the films to the various patrons on this so called Binderup Circuit.

He built up, as the evidence will disclose, this circuit at considerable expense to himself before it finally became as a whole operated by him.

Now this action is brought, as the court will instruct you, and as you ought to understand, under acts of Congress, and you have heard Mr. Mullen refer to a trust and so forth—it is brought under the Act of Congress known as the Sherman Act, which is against the creation of conspiracy and combinations to restrain trade and all such things as that, and other Acts which have been since passed amendatory of said Act, and it is under that Act that this action is brought.

Now there are a large number of defendants, as stated by counsel for the defence in their statement to you in examining you as jurors have referred to, and it probably will be necessary for me to explain a little with reference to them.

The first concern that Mr. Binderup became interested with the purchase of his films, and the one that lent him this encouragement in the start was the Pathe Exchange Incorporated, which is a corporation under the laws of the state of New York and has its principal place of business there, and is managed and conducted from there. It has a branch exchange here in the city of Omaha which is in charge of a man whose name I will hereafter give you, who is known as the branch manager and who conducts the business
106 for Pathe Exchange Incorporated at Omaha in the branch exchange of that Company here.

There is also a defendant named Pathe Exchange Incorporated of Nebraska, but I have been since advised that sometime before this suit was brought, and without our knowledge at least, that company was dissolved and merged into the Pathe Exchange Incorporated of New York City.

Now there is next the Exhibitors Mutual Distributing Corporation, also organized under the laws of the State of New York and has its principal place of business there. It maintains a branch office in the city of Omaha in charge of a branch manager to look after its business.

The same is true of the defendant Robertson-Cole Distributing Corporation, except that that concern is the successor of several other concerns that had previously existed but who finally merged their business with the Robertson-Cole Distributing Corporation.

The evidence will show that that corporation was organized under the laws of the state of New York and that the film productions of

said corporation had previously been handled in Omaha by the defendant Exhibitors Mutual Distributing Corporation. When the defendant Robertson-Cole Distributing Corporation finally took over the film production heretofore handled by the Exhibitors Mutual Distributing Corporation and thereafter released and distributed its own productions, and for such service established a branch office and employed a branch manager of the same corporation to-wit, the Exhibitors Mutual Distributing Corporation, and assumed the obligations of all contracts held by the patrons for the use of the productions entered into in its behalf by the Exhibitors Mutual Distributing Corporation, they continued business in the same place and in the same manner and under the name of the Robertson-Cole Distributing Corporation.

Now during all these times there was another defendant, the Famous Players-Lasky Corporation, which was also organized under the laws of the state of New York with its principal place of business there and it also maintained a branch office in the city of Omaha in charge of a branch manager to conduct its business here.

Same is also true of the Select Pictures Corporation. It is also a corporation organized under the laws of the state of New York its principal place of business there and its business in charge of a branch manager at Omaha.

107 The same is true of defendant Goldwyn Pictures Corporation which was also a corporation organized under the laws of New York and it in turn maintained a branch exchange here in Omaha, in charge of a branch manager.

The same is true of the Fox Film Corporation, which was also a corporation under the laws of the State of New York and transacting business in the same manner herein in Omaha in charge of a branch manager.

The same was also true of the defendant the First National Exhibitors Circuit, Incorporated, which was incorporated under the laws of the State of New York, with a branch here in charge of a branch manager.

There is a defendant here named as the A. H. Blank enterprises. Now that turns out to be the trade name of A. H. Blank who is also a defendant, both being the same defendant. He transacted his moving picture business under the name of A. H. Blank enterprises, who is now engaged in the moving picture business and is a distributor of films and pictures in Omaha for himself and for the defendant First National Exhibitors Circuit, and for such purpose he maintained during the times I have mentioned, offices in Omaha, Nebraska, Des Moines, Iowa, and Kansas City, Missouri, through which offices it distributed to its patrons its films and pictures and the products of the First National Exhibitors Circuit.

Now, I am not certain, the defendant will advise you as to that, whether A. H. Blank or A. H. Blank Enterprises distributed anything besides the First National Exhibitors Circuit pictures or not.

The defendant the Vitagraph-Lubin-Selig-Essanay, Incorporated, was the firm name of what is now known as the Vitagraph Company. They have answered here and admitted that they are the successors

in business and are now carrying on the business formerly carried on by the defendant as I have given it to you. It was organized under the laws of the State of New York with its principal place of business there, and having a branch Exchange in Omaha in charge of a branch manager.

The same is true also of W. W. Hodkinson Corporation, a New York corporation with a branch here, in charge of a branch manager.

The same is true of the Metro Pictures Corporation, a New York Corporation with its exchange here in charge of a branch manager.

108 The same is also true of the Universal Film Exchange, Incorporated, incorporated under the laws of the State of New York and maintaining a branch here in charge of a branch manager.

There was another defendant called the Læmmle Film Service which is not here because it appears they have gone out of business and transferred their business to another concern which is also the situation with Carl E. Læmmle and they are not now defendants in this case.

There is another defendant, Enterprise Distributing Corporation, organized under the laws of the state of New York, having a branch office in charge of a branch manager.

The defendant, Fontenelle Feature Film Company, Incorporated, was organized under the laws of the State of Nebraska and had its principal place of business here at Omaha in charge of a manager.

The defendant Globe Film Company is a co-partnership consisting of one Hawkhurst and one Wirpel. They were engaged in the distribution of one single film known as "The Eyes of the World". They were a partnership and the marshal was unable to find either of the partners in the state of Nebraska at the time summons was served.

The defendant Hall Mark Pictures Corporation is a corporation organized and existing under the laws of the State of New York with its principal place of business there and it maintains a branch office in Omaha, Nebraska.

Now it will appear from the testimony in this case, and it may be a little confusing at times, that these corporations have at times changed front, have changed their names, have merged into other corporations, or they have gone out of business and other concerns have taken up their work and distributed their films and programs, and that will account, as the evidence will disclose, for a change in name as the testimony will from time to time refer to a concern that does not appear to be among the defendants here, but it is because they have either gone out of business and transferred their business to other people or because just their name has been changed, as notably Robertson-Cole Distributing Corporation which took over the distribution of its own pictures after having one of the defendants here do that for them.

Now during the year 1915, and at all times since said year and for many years prior to the year 1915, all of the foregoing defend-

ants or their predecessors, were engaged in the moving picture business either as producers and manufacturers of moving picture films, or as distributors thereof, or both, that after the work of production and manufacture of a moving picture had been for the most part completed by the defendants, it was usually perfected, passed upon and approved by the defendants at their place of business in New York City and when so perfected and the advertising matter accompanying the same had been prepared, the defendants would publicly announce to the world by an extensive system of advertising that the picture would be released on a certain day, meaning thereby that the same would upon said date be sent out from their said place of business in New York by express or parcel post to their various branch offices established by them in the large cities throughout the States and territories of the United States, and in particular in Omaha, Nebraska, there at their branch offices and by their branch agents to be distributed to their patrons in the states of Nebraska, Iowa, and South Dakota, for use and display in various moving picture theatres.

Now the evidence will disclose more particularly in that regard and as an explanation of the word "release" that as you have seen upon the moving picture and upon the screen, "release such and such a day" and the evidence is that that was the time when it was allowed to be exhibited to the public. Now the evidence will disclose where they sometimes sent out to their branch managers throughout the United States those pictures in advance all through the country sending some of them to Omaha, some to Kansas City, some of them to Chicago, and so forth, and they were held there until New York gave the word that they would be released on such a day, and not until that day were their branch managers permitted to in turn send them out to the exhibitors.

During all the times hereinafter mentioned, the defendant Omaha Film Board of Trade was and now is a corporation organized and doing business under the laws of the State of Nebraska, having its principal place of business in the city of Omaha, in said State, that said Film Board of Trade was incorporated to carry out the objects and purposes set forth in their Articles of Incorporation which will be shown in the evidence.

Now the evidence will disclose that all of the defendants here with two or three exceptions were members of this Film Board of Trade, in this way, that they allowed their branch managers to become members of this Film Board of Trade, the membership fee was paid by the New York concern, the main concern, and their branch managers became members of this Film Board of Trade and met as its directors and officers in the transaction of business. I will have more to say about that a little later on.

Now, among these defendants in this case are certain individuals whom I will proceed to name and explain to you just their connection in this case.

First, during the time mentioned here was Harry D. Graham. He was the branch manager at Omaha, Nebraska, of the Pathe Exchange and he was manager of the Pathe Exchange Incorporated of Nebraska before it was dissolved and merged in the Pathe Exchange

Incorporated of New York. He was one of the incorporators and president and presiding officer of the board of directors of the Omaha Film Board of Trade, assisting in its organization and in the transaction of business until sometime in December, 1920, when some one else succeeded him as president of the Board but he still remained a member thereof.

The next individual defendant is Sidney Meyer, manager of Omaha of the Fox Film Corporation. He was one of the original incorporators and I believe the first secretary, assisted in the organization and in the transaction of its business. He was the branch manager as I said of the Fox Film Corporation.

The next individual was William F. Coleman, assistant manager of A. H. Blank and A. H. Blank Enterprises, and was assistant secretary of the defendant Omaha Film Board of Trade. The next individual is Charles W. Taylor. He was branch manager in Omaha of the Select Pictures Corporation and vice-president of the Omaha Film Board of Trade.

The next individual was James H. Calvert, branch manager of the Universal Film Exchanges Incorporated at Omaha. He was also branch manager at that time of the Læmmlé Film Service, and was one of the directors of the Omaha Film Board of Trade.

Another defendant is Eugene Blazer, one of the counsel for defendants here and he was a member of the board of directors of the Omaha Film Board of Trade when it was instituted, but I believe afterward left the board, but at all times was counsel and attorney of the defendant Omaha Film Board of Trade.

The next individual was Samuel A. MacIntyre, branch manager of the Metro Pictures Corporation and a member of the board of directors of the Omaha Film Board of Trade.

111 The next one is Edmund J. MacIvor, branch manager at Omaha of the Goldwyn Pictures Corporation, and he was a director of the Omaha Film Board of Trade.

Charles L. Peavey, was branch manager at Omaha of the Defendant Famous Players-Lasky Corporation of New York, and since February 15, 1920, has become and now is branch manager at Omaha for the defendant Robertson-Cole Distributing Corporation and a director of the Omaha Film Board of Trade.

The defendant Earl C. Holah was manager at Omaha Nebraska, of the defendant A. H. Blank Enterprises and as such was branch manager of the First National Exhibitors Circuit, and was a member of the board of directors of the Omaha Film Board of Trade.

Defendant Max Wintroub was manager of the Fontenelle Feature Film Company and a member of the Omaha Film Board of Trade.

Defendant Elmer J. Tilton, who has not been served, was branch manager of the Exhibitors' Mutual Distributing Corporation, and in October, 1919 was succeeded as branch manager by the defendant Maude E. Larson. The defendant Maude E. Larson was also manager of the Hall Mark Pictures Corporation.

Thomas E. Delaney was the branch manager of the Vitagraph-Lubin-Selig-Essanay, incorporated, of New York and a member of the board of directors of the Omaha Film Board of Trade.

John J. Milstein—I believe he has not been served, being out of the state—but he was during that time the branch manager of the W. W. Hodkinson Company until about October 13, 1919.

The defendant Herbert K. Moss was branch manager at Omaha of the Enterprise distributing Corporation until November, 1919, when he became manager of the W. W. Hodkinson Corporation at Omaha.

The defendant Harry F. Lefholz was the assistant manager of the Universal Film Exchanges and of the Læmmle Film Service, Incorporation, and was a member of the Omaha Film Board of Trade.

That during all these times the defendants Exhibitors' Mutual Distributing Corporation, Robertson-Cole Distributing Corporation of New York, W. W. Hodkinson Corporation and the Hall

112 Mark Pictures Corporation and the defendants Maude E. Larson, Edmund J. Tilton, and John J. Milstein while not actually members of the Omaha Film Board of Trade were affiliated and acting with, and working in conjunction with and in sympathy with the defendant, The Omaha Film Board of Trade.

That in carrying on his business as hereinbefore alleged it was necessary for the plaintiff to procure, by paying the price therefor and transmission charges thereon, from many of the defendants above named moving picture films and advertising matter, through their branch officers and agents at Omaha, Nebraska, and it frequently became necessary in order to supply the demands of this plaintiff in that regard for the said defendants to procure at points outside of the State of Nebraska, moving picture films and the necessary advertising matter to accompany the same, constituting the program which plaintiff desired to exhibit at some one or all of his moving picture theatres, which films and advertising matter were in due season forwarded to him by express or parcel post. Now to explain; The Omaha Film Exchange would not have on hand a particular picture which they had agreed to furnish plaintiff but they would procure it for him sometimes from Chicago, or Minneapolis, or New York or different places, and forward it on to him and plaintiff himself, acting upon this sort of a situation and with the advice of those interested, has been compelled to get some of his programs and advertising matter from Denver, Colorado, or from Kansas City at times, when they did not have it on hand at Omaha. I will explain right here this fact, which the evidence will disclose, that the defendants who were the main distributors in New York City and who had the exclusive right to distribute said pictures were confronted with the situation that all over the United States picture theatres were springing up and they had to have some manner or method of supplying to the exhibitors these moving picture films so they proceeded to parcel off the United States into zones, dependent a good deal upon the ability of a branch house to manage the number of theatres in a particular zone. They established a zone here in Omaha which is the one with which we are particularly concerned at this time. That zone included the State of Iowa for most of the defendants, all of the State of Nebraska—altho some of the defendants excluded a few counties in the state—the state of

South Dakota—and some of the defendants may have divided that up somewhat, and some of the defendants included a part of Minnesota as a part of this zone. Anyway, from the city of

113 Omaha and through their branch houses located there they supplied not only the greater portion, if not all, of the state of Nebraska and of Iowa, also South Dakota and a part of Minnesota and possibly there may have been with certain of the defendants a little extension of this zone. But they established a rule as the evidence will disclose, that whatever exhibitor lived within that zone had to get his films from Omaha and through their branch establishments there. It could not be procured by him from any other place and if Omaha did not have it and couldn't get it, he couldn't have it. And he had to make his application and his arrangement with the branch houses and they would endeavor to fill his needs from what they had on hand or by getting it from some of the other zones or districts or from the city of New York for that purpose. But he was in what was known as the Omaha zone, and in all cases the moving picture films was sent out from New York City to these various zones and distributed from their branch house in a certain city within that zone, and in the Nebraska-Iowa zone, the Omaha zone, they established branch exchanges in charge of branch managers to distribute their films through this zone through the states of Nebraska, Iowa, and South Dakota out from Omaha. The evidence will disclose that there was something like four hundred and fifty—in that neighborhood—of moving picture theatres in the zone constituted as I have stated from which all of the theatres were supplied through the branch houses of the defendants in Omaha. It will also appear in evidence here that something like two hundred and fifty of those moving picture theatres were in Nebraska alone, the balance of them being in these other states, as I have stated. So it became necessary upon the establishment of those zones that Mr. Binderup for all the theatres along and upon his circuit should apply for the moving pictures to the branch managers of the defendants at Omaha, Nebraska, and at no other place. His business was constantly growing and became large in volume, necessitating his entire time and attention and the expenditure of large sums of money and as a result his business became, and was during all the times hereinafter mentioned, highly profitable and successful and by reason of such fact, the cupidity and jealousy of the defendants Universal Film Exchanges, and the Laemmle Film Service, which is one and the same thing now, and it became so in the latter part of his business, James H. Calvert and Harry F. Lefholz were excited, and during the month of February, 1918, the

114 said defendant, Harry F. Lefholz called upon the plaintiff at Minden, Nebraska, representing that he had called at the request of the New York manager and was speaking for the defendants last named and demanded that he give them a considerable share of his patronage and upon plaintiff declining to do so, then and there threatened the plaintiff that the said defendants last named would put him out of business and "would bust him up in business" by starting an exchange at Holdrege, Nebraska, and

supply by underbidding all the theatres of which plaintiff's said circuit was composed and depriving him of the business thereof; and that thereafter the said defendant did establish such exchange and did attempt and endeavor to put this plaintiff out of business by offering to supply the theatres on said circuit, picture films at a discount. That was their first move, as the evidence will disclose. During the month of April, 1919, all of the defendants named; except those mentioned in paragraph 40—those were the ones I stated to you did not join this film board but affiliated with it, sympathized with it and were influenced by it as the evidence will disclose—for the purpose of enabling them to control the prices and dictate the terms upon which they would transact business with their patrons operating theatres throughout the States of Nebraska, Iowa, and South Dakota, and in order to force their claims, demands and decisions, as to business conditions and terms upon their said patrons, caused to be organized at Omaha, Nebraska, the defendant Omaha Film Board of Trade which was incorporated during said month of April, 1919, under the laws of the State of Nebraska.

The evidence will disclose that before that time they had a sort of a club called the Film Club in which they met together and talked over matters and things pertaining to their business and talked over their patrons and so forth. Then that finally resulted in the organization of the Omaha Film Board of Trade. The plan of operation of said corporation, being as stated in their articles, a copy of which is attached hereto marked Exhibit A, and made a part hereof, shall be to have it composed of those persons or corporations engaged in the film business particularly motion picture films distributing companies, corporations or individuals, engaged in that business, and the evidence will disclose that, for instance, when a branch manager resigned or was transferred from Omaha and went to some other place or with some other company he resigned from the Film Board of Trade and his position was taken by their new manager who took his place with this film Board of Trade, thus keeping up the connecting link between New

115 York and Omaha with and through this Film Board of Trade, one share of stock to be issued to the manager of each of said companies or to such individual to entitle them to membership therein. Such stock to be non-assessable and non-transferable except to such corporation and individuals as may have been approved of by the membership of said Film Board of Trade and it may prescribe and collect dues, assessments and fines. Now when a new manager came in he would have to apply for membership and they would have a meeting and approve or disapprove of his application. If they approved he got in and became a member of that Film Board of Trade, and the expense that the manager was put to was borne by the New York defendant in each and every instance.

During the early part of the year 1919, plaintiff's business had grown to such a large proportion and became so successful and profitable, which fact became known to all defendants herein named; that during said year and prior to the month of September, 1919, plaintiff was procuring for use in his said picture houses

and upon his said circuit, programs from the defendant, Pathe Exchange Incorporated, of New York, Pathe Exchange, Incorporated of Nebraska, First National Exhibitors Circuit of New York, and A. H. Blank Enterprises of Omaha, Nebraska, Des Moines, Iowa, and Kansas City, Missouri, The Famous Players-Lasky Corporation of New York, all of whom were members of the Omaha Film Board of Trade; that he was frequently solicited as the evidence will disclose, by representatives of other defendants, who were also members of said Film Board of Trade, for a share of his business because it had grown to such proportions, 28 theatres being supplied and because of his failure to deal with said other defendants, a spirit of hostility was aroused upon their part toward this plaintiff, and great pressure was brought to bear by them upon these defendants with whom said plaintiff was dealing as aforesaid, to compel them to cease doing business with said plaintiff, and the evidence will disclose that at one time three of these defendants, acting thru the Omaha Film Board of Trade, signed a petition and presented it to another defendant here, the Pathe Exchange with whom the plaintiff Binderup had been doing business from the very start which encouraged him to build up this circuit, and that petition to the Pathe Exchange of New York was to influence and direct and require the branch manager to cease doing business any more with Binderup, giving and stating a variety of reasons for their actions in that regard, and demanding that they cease to furnish him any more films as they themselves had ceased to do. Finally, through the influence brought through the Omaha Film Board of Trade and its members and these three concerns 116 in particular the Pathe Exchange joined the others in a final refusal to supply Mr. Binderup or to carry out the contracts that they had with him.

Thereupon and during the month of August, 1919, and at all times since and until the date of the filing of this complaint, all of the above named defendants wrongfully, unlawfully and contrary to the act of Congress in such case made and provided, combined, confederated, and conspired in restraint of trade and commerce among the several states, with the purpose and intent of preventing the plaintiff from carrying on his said business and from continuing therein, and with the intent and purpose to ruin plaintiff in his business and his credit and reputation, and with the intent and purpose of monopolizing and attempting to monopolize the distribution and leasing and selling within the territory comprising the Omaha zone of the picture film programs and in furtherance of said conspiracy and to accomplish their ends in that regard, the defendants who were members of the defendant Omaha Film Board of Trade caused false charges to be made against the said plaintiff and brought before the members of the said Film Board of Trade and without the knowledge of this plaintiff and without giving him an opportunity to be heard, he was placed upon the so-called black list or blue list of the defendant Omaha Film Board of Trade.

Now it will appear in evidence here that when any member prefers charges against any other member of the film board of trade or against any exhibitor in the Omaha zone or against any person or firm who had anything to do with the moving picture business, whether he was a member of the board of trade or not—and Mr. Binderup was not a member—they would prefer charges against the party and they would send out notices to Mr. Binderup sometimes—in this particular case they didn't have any knowledge of it for sometime—but ordinarily they would give him an opportunity to be heard and he could come and explain the situation. Then they would vote on it and if they found him guilty they would place him on the blue list, which was a card upon which his name, place of business, residence, and so forth were put, and he was marked as unfair and not a proper person for the members of the Film Board of Trade to have anything to do with. This blue list, which amounted to what we all know as a black list, was sent to all the members as the evidence will disclose, of the Omaha Film Board of Trade and not only to the members but it was called to the attention of those who were not members but were engaged in the moving picture business here in Omaha, and in the

117 distribution of films, and their attention was called to it and the result of that was that immediately upon receipt of that blue card the stuff was off, he could get no more films from anybody nor anywhere; he couldn't even get them outside of the Omaha zone, as the evidence will disclose, because his theatres all being within the Omaha zone he had to apply to Omaha and he couldn't get them from anywhere else.

Now to continue as to this particular matter here, thereupon the proper officers of said Omaha Film Board of Trade caused notice of said action in placing plaintiff upon said black or blue list to be given to each and every member of said Film Board of Trade by mailing or delivering to each a blue card upon which appeared the name of this plaintiff. Whereupon, each and every one of the defendants who were members of said Omaha Film Board of Trade, or affiliated therewith, at once ceased to and refused to transact any further business with the plaintiff or to render him any further service or to deliver to him programs, moving picture films and advertising matter, for use in his business, notwithstanding he had unfilled contracts fully paid for, and in force, requiring such service and the delivery of such programs, moving picture films and advertising matter, from the defendants, Pathé Exchange, Inc., of New York, Pathé Exchange, Incorporated, of Nebraska, A. H. Blank Enterprises and Famous Players-Lasky Corporation and Exhibitors Mutual Distributing Corporation; that these defendants herein who were not members of the said Omaha Film Board of Trade become advised of the action of the said Film Board of Trade and co-operated with and approved of the action of the said Board and entered into and became a part of the said conspiracy against this plaintiff to ruin his business and his credit and reputation; and thereafter, the defendants through their agents and branch offices at Omaha, Nebraska, caused notices

to be sent to the persons operating the various moving picture theatres comprising the Binderup Circuit as aforesaid, advising them that on and after the 15th day of September, 1919, it would be necessary for them to order their programs and service direct from the Omaha Exchange because all the exchanges had decided to discontinue supplying the Binderup Circuit with any programs, films, advertising matter or service; that thereupon the various defendants named caused their representatives to call upon the persons operating the picture theatres comprising the so-called Binderup Circuit and the theatres owned and leased by this plaintiff at Franklin, Bloomington, Upland, Blue Hill and Alma, 118 that later on plaintiff was personally notified that defendants would refuse to furnish him with program or service at his own theatre at Minden.

On or about the 1st day of September, 1919, as plaintiff is informed and believes, he was by the action of the Omaha Film Board of Trade removed from the so-called black list or blue list, and as a result of such action, various representatives which he had no business dealings with in 1919, called upon him at Minden, Nebraska, and solicited his business for the supplying of film service and programs at the various moving picture houses operated by him and by the theatres operated on the so called Binderup Circuit, but plaintiff declined to entertain their business proposition in that regard.

Now, as the evidence will disclose it seems there was a mix-up in accounts. It was an error in book-keeping of one of the Exchanges here in Omaha, that in effect, upon the face of it, it showed that Binderup had not been complying with his contract and without giving him an opportunity to be heard or notifying him in that regard they immediately found him guilty and put him on the blue list and stopped his business. But he got busy as he learned about it, and, as the evidence will disclose, very shortly convinced them that it was their error, that he was not at fault, and as a result they restored him to it—that is they revoked the blue list. Then they put him on the white card and the white card was sent out to the same people to whom they sent the blue card so that they were free to do business. Thereafter, on or about the 10th day of November, 1919, in furtherance of the said conspiracy and for the purpose of carrying out the intent and purpose and object thereof to ruin this plaintiff in his credit and reputation, and destroy his business, the said defendants conspired, confederated and combined and caused further charges to be made against the said plaintiff before the Omaha Film Board of Trade, and plaintiff, without notice or knowledge upon his part and without being given an opportunity to be heard, was again placed upon the so-called black list or blue list by the members of the Omaha Film Board of Trade and immediately thereafter received notice from the defendants with whom he was dealing that they declined to make shipment of programs or give him further service. Thereupon plaintiff came to Omaha, Nebraska, to ascertain what the trouble was and then and there became advised of the action of the defendants, through

the defendant Omaha Film Board of Trade, in placing him upon the so-called black list or blue list of the said Omaha Film Board of Trade. He called upon the several defendants with whom he was carrying on business at that time, requesting to be given service and to be shipped programs, all of which requests were denied and he was advised that no further service and no further programs would be shipped until his name had been removed from the blue list or black list by the members of the Omaha Film Board of Trade, or by the Grievance Committee thereof; that thereupon some of the defendants caused the Grievance Committee to be called together which committee met at the office of the defendant Eugene Blazer, in the City of Omaha, State of Nebraska, and in the presence of this plaintiff, that said committee were unable to reach any conclusion, and in the presence of the plaintiff - plaintiff was invited to be there and was there—I understand the evidence will disclose that he had already been put upon the blue list and he was given notice of it after that had been done, and the hearing which he had and the explanation which he was allowed to make came after he had been placed on this black list or blue list in the effort on his part to have their action revoked—and in the presence of this plaintiff the said committee were unable to reach any conclusion and declined to take any action with regard to the matter and suggested that the matter be referred to the entire board of disposition; that thereupon, and upon the same day, defendant Blazer, attorney for the said Omaha Film Board of Trade, called a meeting of the members of the said Film Board of Trade to be held at his office, and a meeting thereof was held at said office on the afternoon of said day, to wit, the 13th day of November, 1919; that at said meeting there were present the following named defendants; Harry D. Graham, Sidney Meyer, James H. Calvert, Samuel A. MacIntyre, Edmund L. MacIvor, Eugene N. Blazer, William F. Coleman and Maude E. Larson—Maude E. Larson was not a member of the Exchange at the time, I understand, but she was present—and after discussion motion was made and unanimously adopted as follows: That Mr. Binderup be kept on the blue list indefinitely, and that he be not supplied with any service whatsoever as far as bookings for any house that does not actually and wholly belong to him outright, and in reference to the houses that he claims belong [—] himself, that he sign affidavit showing what ownership he has in each house, and further that he be not supplied with any films whatsoever for his own use until he has deposited one thousand dollars in some bank or trust company, subject to forfeit and check by the Omaha Film Board of Trade, if at any time, he shall violate any of the rules of this association. Thereupon in the presence of the said board, this plaintiff protested against and objected to such action being had as being illegal, unlawful and plaintiff declined to make the deposit of one thousand dollars required of him and denied that there was any good reason, or ground, for such action of the members of the Omaha Film Board of Trade, and requested that he be allowed to see and be informed of the charges against him and

an opportunity to be heard in respect thereto, and such charges as were referred to in the discussion by the members in his presence this plaintiff absolutely denied and refuted by the evidence of members present who knew the truth with respect thereto. That thereafter, and ever since, in furtherance of said conspiracy, the defendants and each of them, have wrongfully, unlawfully and contrary to the Act of Congress hereinbefore referred to refused to have any dealings with this plaintiff and furnish him with film service and programs and have caused unexpired contracts which he held with some of the defendants entitling him to such programs and service to be illegally and unlawfully canceled and he ever since has been and is now deprived of such service and programs; that these defendants mentioned in paragraph 40 hereof who were not members of the Omaha Film Board of Trade, with one of whom, to-wit, the Exhibitors Mutual Distributing Corporation there was a contract for service fully paid for by this plaintiff, likewise acting in sympathy and conjunction with the members of the said Omaha Film Board of Trade, refused to furnish plaintiff with service and programs at the picture theatres upon his said circuit. Now, in this tempest in a teapot, as I shall term it, the facts were about like these; Minden is not far from Kearney. At Kearney there is the State Industrial School. The superintendent of that school called up Mr. Binderup and asked him if he could let them have a film, a picture to show to the boys there that night or the following night—or a military academy it is. They selected the one that they wanted and he said, "why yes, you can have it." Now he didn't have any contract with any theatre, neither did he have a theatre at Kearney. While he was to send it out, for some reason or other he did not send it, and the superintendent of this military academy drove over to Minden himself. He did not find Binderup in the office but he found the film there, and as I understand it, he took the film and took it over and showed it and brought it back to Mr. Binderup. Now that film was returned to Omaha within the time specified in Mr. Binderup's contract. Mr. Binderup received a small fee for that service or for the use of that film. His action in loaning or letting that film be exhibited at the Kearney military academy became known to the Pathe concern—it was a Pathe picture, as I understand—and he came to Omaha and saw the branch manager of Pathe and explained the circumstances some days after it had occurred quite a little while, a few weeks perhaps—he explained the circumstances and offered him his proportion of the fee received, that is, what Binderup would be required to pay. The branch manager says, "No, Binderup, let it go, you have opened up a new field for me and since that time we have been furnishing pictures to that concern and we have added a good customer to our list, but," he says, "Don't do that again without letting us know before hand in order to avoid trouble with our competitors", and Mr. Binderup supposed that was the end of it. But these defendants made use of that circumstance and that was the foundation, as the evidence will disclose, of charges that were made against Mr. Binderup be-

fore the board of Trade on the occasion on which he was placed on the black list before he had opportunity to make explanation.

Plaintiff further alleges that as a part of the conspiracy charged to ruin the plaintiff's business and to ruin his credit and reputation, the defendant Globe Film Company during the month of September—

Judge Sullivan: Is the Globe Film Company a defendant herein?

Judge Baxter: They are defendants that have taken part in this conspiracy and we claim they have assisted you people in carrying that out. The fact that we have not been able to get service against them does not make any difference.

Mr. Mullen: You do not claim that they were members of the Film Board of Trade?

Judge Baxter: They were not members of the Board of Trade but they assisted in carrying out this conspiracy and worked in collusion with the rest of you.

Judge Baxter (resuming his statement): Plaintiff further alleges that as a part of the conspiracy charged to ruin the plaintiff's business and to ruin his credit and reputation, the defendant Globe Film Company during the month of September, 1919, made representations to the various members of the Binderup Circuit and to the operators of moving picture theatres owned by plaintiff, that any service he would receive or be furnished in the way of moving picture programs, would be of an inferior character and poor in quality, and that it was their intention to start new and independent theatres in all good towns in which plaintiff controlled moving picture theatres, in particular in his home town of Minden, Nebraska, and further represented that Film Exchanges at Omaha had or would decline to give plaintiff anything in films. By reasons of said combination and conspiracy—and as a matter of fact there was established an Exchange at Holdrege for that purpose. These people went around among Binderup's patrons, as the evidence will disclose, but not one of his patrons would have anything to do with them or consent to accept films from any other source except from Binderup himself. And the evidence will disclose that instead of giving pictures in bad shape and condition as referred to in the petition, he personally inspected those films and gave good service to the entire satisfaction of all of the patrons upon his circuit, and from no source along his circuit was there any complaint so far as the evidence will disclose, as against Mr. Binderup or his manner or method of securing his films.

Drawing this matter to a close, Gentlemen: In doing business with the patrons upon his circuit, as the evidence will disclose, Mr. Binderup did not require any one of them to get all of their films service from him. Those whom he was furnishing, as I have stated, films service and programs and so forth for exhibition had a perfect right, so far as any arrangement made with Mr. Binderup, to get pictures from any place they chose or from any of the defendants they chose or from any source that they could get them; they didn't have to deal with him, but there was a reason for dealing with him

because as I have stated, the evidence will disclose that they receive the service, inspected and in good condition, for a far less price than they could personally or individually receive the service from Omaha, Nebraska. And the evidence will disclose that Mr. Binderup furnished these patrons with this service at a flat rate; that they paid no tax, they paid no express, they paid no postal charges, nothing except the flat rate, whereas if they had individually taken the service from any of the defendants at Omaha they had to pay express and postal charges for transporting it; they had to pay war tax; and they had to keep on deposit with the Omaha concern or the branch of the New York Concern at Omaha a certain sum of money and make certain agreements with regard to the number of films that would be exhibited and so forth, but nevertheless they had the right to procure outside of Mr. Binderup if they chose.

Now, I am reminded that along at the same time when the Kearney matter was before this Omaha Film Board of Trade
123 that there was a matter pertaining to certain charges against a man by the name of Ruby who was exhibiting and operating a theatre at Orleans, Nebraska, and was one of the Binderup circuit, one of Binderup's patrons. This man himself wanted a certain film, and Binderup either didn't have it, or I don't know that he said anything to Binderup about it, but on his own account he ordered from the defendant, the Universal Film Service, I believe it was, certain film, the price of which was fifteen dollars as the evidence will disclose. He received either by express or by mail a film, and when he received it it came C. O. D. \$15.00 and he had to pay the \$15.00 and when he opened it and was able to exhibit it he found it was not the film that he ordered but that it was a film that was listed at \$7.50. Well, he didn't have anything to do but to exhibit this film because he didn't have any other and so he ran the film and when he sent it back to Omaha he sent it back C. O. D. \$7.50 so as to make himself whole for the \$7.50 that he lost. Now charges were preferred before the Film Board of Trade as against this man Ruby and of course they knew he was one of Binderup's patrons. They immediately blacklisted Mr. Ruby and would not allow him to have any further film service. They then took it up with Binderup and insisted that Binderup should have no further business relations with Mr. Ruby with reference to furnishing the film service; that he too should co-operate with them and cut Ruby off and they caused to be sent to Binderup a telegram which was as follows, as the evidence will disclose, in this case—"Omaha Nebraska—

Mr. Mullen: We object to a statement of this entire transaction because it is not within the pleadings and not within the issues.

The Court: Well, the objection is as to the reading of the Telegram and that is well taken. You would have no right to read that before it has been offered in evidence. You will please refrain from that.

Judge Baxter (resuming his statement): They demanded from Binderup and caused a telegram to be sent to him demanding that he should refuse to give Mr. Rudy any service—

Mr. Mullen: I renew my objection that counsel has no right to comment on this telegram and to put it before the jury indirectly, what the Court has instructed him not to do by reading the telegram. This matter is not within the issues of the case.

124 Judge Baxter (resuming his statement): By reason of said combination and conspiracy and the illegal acts of the defendants above named, the plaintiff, ever since the 13th day of November, 1919, has been utterly unable to secure film service, programs and advertising matter for his various theatres hereinbefore referred to and has thereby been prevented from carrying on his business in all of the moving picture theatres hereinbefore mentioned and of supplying his patrons at the theatres named as comprising the Binderup Circuit; that as a result his said business has been totally destroyed and he has been unable to lease to advantage, picture theatres owned by him, and those theatres leased by him hereinbefore mentioned, he has been unable to operate to advantage and many of them are closed and have been put out of use, all as more particularly hereinafter alleged and he has wholly lost the profits which would otherwise have accrued to him, all to his great loss and damage.

Plaintiff further alleges that by reason of the said alleged conspiracy and the alleged acts of the defendants as above set forth, plaintiff has been deprived of patronage, since the 13th day of November, 1919, of all of the operators of the theatres comprising the Binderup Circuit and from supplying them with programs, films and advertising matter and that he has wholly lost the profits which would have otherwise accrued to him therefrom all to his great loss and damage.

By reason of said combination and conspiracy and the illegal acts of the defendants above set forth, the plaintiff has been put to great expense and loss of time in the effort to adjust his said business and in caring for his property interests so as aforesaid made comparatively useless for the purposes for which they were designated and also has been put to great expense in the employment of counsel, and so forth.

Now, after he had been put upon the black list finally in November and his business had been destroyed and ceased in his own theatres they absolutely refused as long as Binderup had anything to do with those theatres to furnish anybody, as the evidence will disclose, who conducted business in his place unless as they demanded, they would file affidavits and evidence to convince them that Binderup had no interest in the business whatsoever, and no connection therewith. Otherwise, unless they made affidavit and gave the defendants that assurance they positively refused to permit anybody else, in the same theatres that he owned and had operated himself, from carrying on the moving picture business, and as a result some of them were

125 abandoned as theatres at all. Some of them he had to sell and absolutely get out from under all of this business. Nobody in any of his own houses that he had formerly owned and controlled and operated could carry on the moving picture business. Along his circuit, as the evidence will disclose, when these men were

out off like that (*snapping his finger and thumb) for service which they had billed and which the evidence will disclose they had advertised for several days before that time, and they were unable to do it, they rushed to Omaha or phoned to Omaha, communicated with them, to find out what the trouble was, and they were told that so long as they had anything to do with Binderup there was nothing doing, and they said, "You can have no films so long as you have anything to do with Binderup," and they were compelled to come in town or to furnish affidavits and proof that Binderup had no interest with them in the further production of those films and that they would have no dealings in that regard before they would allow and permit them to resume the exhibition of the films by service direct from Omaha, for which, as the evidence will disclose, they paid at least fifty per cent more for the same service to the defendants than they had been getting from Binderup in a very satisfactory manner.

Now then, he was put, as a result of the action of these people, as the result of the action of the defendants through their branch managers and the Omaha Film Board of Trade, and in combination and, as the evidence will show, with an understanding, a complete understanding, between them and also those outside, so that he was sewed up in a bag, so to speak, and was utterly unable to get any film service at all because under the rules established by the zoning system and by the Film Board of Trade he could not send outside of the zone and get any service, because the same people were represented in these outside zones as were represented in Omaha, and as a result he had to quit and cease entirely any and all of the moving picture business, give up his circuit, put his theatres to other uses and to sell them or to lease them and to get entirely out from under them. So that he has since that time been deprived of any income or return therefrom and has sustained a great damage in the loss of property interest and so forth, and it is because of that damage which plaintiff has sustained, and for the reason that but for the action of these defendants the harmonious relations which had theretofore existed between Binderup and the theatres of his circuit would have continued and his profits would have grown larger, as the evidence will disclose, from year to year, so that those profits would have amounted to a considerable sum—it is for those reasons that we have brought this action for substantial damages under the law.

The Court: You claim a right to have three-fold damages under the Sherman Act, do you not—not only the actual damages you may show but three-fold damages.

Senator Brown: Yes, as I understand the rule the jury brings in the verdict for the actual damage and the court multiplies it by three.

Mr. Seabury: I now move on the petition and opening of plaintiff's counsel, separately, in behalf of each of the defendants, for a directed verdict as to each, on the ground that the petition and opening fail to state facts sufficient to constitute a cause of action arising under the Sherman Act or any Act amendatory thereof.

Whereupon the Court, after hearing the arguments of counsel for the respective parties, upon said motion, and being fully advised in the premises, did sustain said motion, to which order plaintiff duly excepted, and thereupon the court instructed the jury as follows:

Instruction to the Jury by the Court.

GENTLEMEN OF THE JURY:

We have had a long threshing out of questions of law presented by the parties in this case, and I have had the benefit of the arguments of counsel, and the citation of authorities by both. I have given the matter consideration and have reached the conclusion that, as a matter of law, there is nothing that would justify a finding against the defendants here and that it is our duty to return a verdict for the defendants. The responsibility rests entirely upon the court where a case goes off in this way on a question of law, and it is not the responsibility of the jury. The clerk has prepared a form of verdict and I will ask the gentleman on this end to step forward as foreman of the jury and to sign the verdict as the verdict of the jury.

To which instruction of the court the plaintiff at the time duly excepted.

127 (*Stipulation as to Correctness of Bill of Exceptions, etc.*)

It Is Hereby Stipulated And Agreed by and between Charles G. Binderup, plaintiff herein, and Pathe Exchange, Incorporated, et al., defendants herein, that the foregoing bill of exceptions contains all of the proceedings had on the trial of the case of Charles G. Binderup, plaintiff, vs. Pathe Exchange Incorporated, et al., defendants, tried in the District Court of the United States for the District of Nebraska, Omaha Division, and correctly shows the proceedings had on said trial; that said bill of exceptions is correct in all respects; that the same may be signed, settled and allowed, and made a part of the record in said cause by Honorable J. W. Woodrough, the Judge who presided at the trial of said cause, without further notice to defendants or their counsel.

C. P. ANDERBERY AND
BROWN, BAXTER & VAN DUSEN,
Attorneys for Plaintiff.

JOHN J. SULLIVAN,
Atty. for All Defts. Except Those Named Below.

ARTHUR F. MULLEN,
*For Defts. A. H. Blank, A. H. Blank Enterprises, and
C. H. HOLAH,*

Attorneys for Defendants.

6-7-21.

(Presentment of Bill of Exceptions by Plaintiff.)

Now, In Furtherance of Justice, and that right may be done, the plaintiff presents the foregoing as his Bill of Exceptions in this case, and prays that the same may be settled and allowed, signed and certified by the Court, and made a part of the record in this cause as provided by law.

C. P. ANDERBERY AND
BROWN, BAXTER & VAN DUSEN,
Attorneys for Plaintiff.

(Approval of Bill of Exceptions by District Judge, etc.)

The foregoing Bill of Exceptions contains all of the evidence given or offered on the trial of the cause of Charles G. Binderup, Plaintiff, vs. Pathe Exchange Incorporated, et al., Defendants and correctly shows the proceedings had on said trial; and said Bill of Exceptions is correct in all respects, and is hereby approved, allowed and settled, and made a part of the record herein.

J. W. WOODROUGH,
Judge Who Presided at said Trial.

Dated at Omaha, Nebraska, this 11th day of June 1921.

Received the foregoing proposed Bill of Exceptions from Plaintiff's attorneys for examination this 2 day of June, 1921.

JOHN J. SULLIVAN,
Attorney for Defendants Other Than Blank.

Endorsed: Filed June 11, 1921. R. C. Hoyt, Clerk.

Assignment of Errors.

Comes now Charles G. Binderup, plaintiff above named and says that the verdict rendered and the judgment entered in the above-entitled cause on the 20th day of April, 1921, under and by the direction of the court, is erroneous and unjust to the plaintiff in that:

1. The Trial Court erred in refusing to permit plaintiff to introduce evidence to support the allegations of his complaint as amended, which evidence plaintiff offered to and was prepared to introduce at the trial, as shown by opening statement of plaintiff's counsel, to which ruling of the court plaintiff duly excepted.

2. The Trial Court erred in sustaining the motion of defendants made at the close of the opening statement by counsel for plaintiff, to direct a verdict for the defendants and each of them, on the ground that the plaintiff's petition and complaint and the statement of plaintiff's counsel as to what plaintiff expected to prove, fail to state facts sufficient to constitute a cause of action arising under the

Sherman Act or any act amendatory thereof, to which ruling plaintiff duly excepted.

3. That the Trial Court erred in instructing the jury at the close of the opening statement of plaintiff's counsel made at the trial upon motion of defendants, as follows:

"GENTLEMEN OF THE JURY:

We have had a long threshing out of questions of law presented by the parties in this case, and I have had the benefit of the arguments of counsel, and the citation of authorities by both.

129 I have given the matter consideration and have reached the conclusion that, as a matter of law, there is nothing that would justify a finding against the defendants here and that it is our duty to return a verdict for the defendants. The responsibility rests entirely upon the court where a case goes off in this way on a question of law, and it is not the responsibility of the jury. The clerk has prepared a form of verdict and I will ask the gentleman on this end to step forward as foreman of the jury and to sign the verdict as the verdict of the jury.

To which instruction of the court the plaintiff at the time duly excepted."

4. The Trial Court erred in entering judgment against the plaintiff on the verdict herein upon the 20th day of April, 1921, which verdict was returned upon instruction by the court. To all of which plaintiff duly excepted.

Wherefore, the said plaintiff, Charles G. Binderup, prays that the said judgment of the District Court of the United States for the District of Nebraska, Omaha Division, be reversed and set aside, and the cause remanded with directions that plaintiff be awarded a new trial herein.

CHARLES G. BINDERUP,

Plaintiff,

By C. P. ANDERBERY AND BROWN,
BAXTER & VAN DUSEN,

His Attorneys.

Endorsed: Filed Jun. 11, 1921. R. C. Hoyt, Clerk.

Petition for Writ of Error.

The above named plaintiff feeling aggrieved by the judgment of this honorable court dismissing his petition, made and entered in this cause on the 20th day of April, 1921, does hereby petition the court that a writ of error issue herein directed to the judges of the District Court of the United States for the District of Nebraska, Omaha Division, for the reasons specified in the assignment of errors which is filed herewith and the said plaintiff prays that said writ of errors be allowed and that Citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said

judgment and order of dismissal was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit sitting in St. Louis, in the State of Missouri.

CHARLES G. BINDERUP,

Plaintiff,

By C. P. ANDERBERY AND BROWN,
BAXTER & VAN DUSEN,

His Attorneys.

Endorsed: Filed Jun. 11, 1921. R. C. Hoyt, Clerk.

(Order Allowing Writ of Error, etc.)

Now on this 11th day of June, 1921, comes the plaintiff, Charles G. Binderup, and files and presents to the Court an assignment of errors and petition for allowance of a writ of error directed to the Judges of the United States District Court for the District of Nebraska, Omaha Division, from the judgment entered in the above entitled cause on the 20th day of April, 1921, upon consideration whereof

It is ordered that the said writ of error be allowed as prayed and that a citation issue directed to the defendants and each of them citing and admonishing them to be and appear in the United States Circuit Court of Appeals in and for the Eighth Circuit at City of St. Louis, Missouri, sixty days from and after the date of the citation. Bond for costs on appeal fixed in the sum of Two Hundred Fifty (\$250) Dollars.

J. W. WOODROUGH,
*Judge United States District
Court, District of Nebraska.*

Endorsed: Filed June 11, 1921. R. C. Hoyt, Clerk.

(Writ of Error and Clerk's Return.)

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the District Court in and for the District of Nebraska, Omaha Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the April Term, 1921, thereof, between Charles G. Binderup, Plaintiff, and Pathe Exchange, Inc., Pathe Exchange, Inc., of Nebraska, Exhibitors Mutual Distributing Corporation, Famous Players-Lasky Corporation, Fox Films Corporation, Select Pictures Corporation, Goldwyn Pictures Corporation, First National Exhibitors Circuit, Inc., A. H. Blank, A. H. Blank Enterprises, Vitagraph-Lubin-Selig-Essanay, Inc., W. W. Hodkinson Corporation, Metro Pictures Corporation, Universal Film Exchanges,

Incorporated, Enterprise Distributing Corporation, Fontenelle Feature Film Company, Incorporated, Globe Film Company, Hall Mark Pictures Corporation, Omaha Film Board of Trade, Harry D. Graham, Sidney Meyer, William F. Coleman, Charles W. Taylor, James H. Calvert, Eugene N. Blazer, Samuel A. McIntyre, Edmund J. MacIvor, Charles L. Peavey, C. Earl Holah, Max Wintraub, Maude E. Larson, Thomas E. Delaney, Herbert K. Moss, Robertson-Cole Distributing Corporation, and Harry F. Lefholz, Defendants, a manifest error has happened, to the great damage of the said Charles G. Binderup as by his complaint appears.

We being willing that error, if any hath been should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 10th day of August, 1921, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Chief Justice of the United States, this 11th day of June, in the year of our Lord one thousand nine hundred twenty-one.

Issued at office in Omaha, Nebraska, with the seal of the United States District Court for Nebraska, and dated as aforesaid.

[Seal U. S. Dist. Court, Dist. of Nebraska, Omaha Div.]

R. C. HOYT,
Clerk of the United States District
Court for the District of Nebraska,
By JOHN NICHOLSON,
Chief Deputy.

Allowed by

J. W. WOODROUGH,
Judge.

132 UNITED STATES OF AMERICA,
State and District of Nebraska, ss:

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the United States District Court for the District of Nebraska.

[Seal U. S. Dist. Court, Dist. of Neb., Omaha Div.]

R. C. HOYT,
Clerk of the United States District
Court for the District of Nebraska.

Endorsed: Filed in the District Court on June 11, 1921.

Citation.

United States of America to Pathe Exchange, Inc., Pathe Exchange, Inc., of Nebraska, Exhibitors Mutual Distributing Corporation, Famous Players-Lasky Corporation, Fox Films Corporation, Select Pictures Corporation, Goldwyn Pictures Corporation, First National Exhibitors Circuit, Inc., A. H. Blank, A. H. Blank Enterprises, Vitagraph-Lubin-Selig-Essanay, Inc., W. W. Hodgkinson Corporation, Metro Pictures Corporation, Universal Film Exchanges, Incorporated, Enterprise Distributing Corporation, Fontenelle Feature Film Company, Incorporated, Globe Film Company, Hall Mark Pictures Corporation, Omaha Film Board of Trade, Harry D. Graham, Sidney Meyer, William F. Coleman, Charles W. Taylor, James H. Calvert, Eugene N. Blazer, Samuel A. McIntyre, Edmund J. MacIvor, Charles L. Peavey, C. Earl Holah, Max Wintraub, Maude E. Larson, Thomas E. Delaney, Herbert K. Moss, Robertson-Cole Distributing Corporation, and Harry F. Lefholz, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, in the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the United States District Court for the District of Nebraska, Omaha Division, wherein Charles G. Binderup is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable J. W. Woodrough, Judge of the United States District Court for the District of Nebraska, this 11th day of June, A. D. 1921.

J. W. WOODROUGH,
Judge of the United States District
Court for the District of Nebraska.

Service upon the defendants of a copy of the foregoing citation is hereby acknowledged this 11th day of June, 1921.

JOHN J. SULLIVAN,
*Attorney for Defts. Except A. H. Blank,
 Blank Enterprises, and C. H. Holah;*
 ARTHUR F. MULLEN,
*Atty. for A. H. Blank, A. H. Blank
 Enterprises, and C. H. Holah,
 Attorneys for Defendant.*

Endorsed: Filed in the District Court on June 13, 1921.

Præcipe for Transcript.

Waiving the printing of the record under the provisions of an act of Congress, entitled "An Act to Diminish the Expenses of Proceedings on Appeal and Writ of Errors on Certiorari," approved February 13, 1911, and electing to take and file the record in the United States Circuit Court of Appeals, Eighth Judicial Circuit, and to be printed under the supervision of the Clerk of said Court in accordance with the rules and practices of said Court of Appeals.

The Clerk of the said District Court of the United States for the District of Nebraska, is hereby requested to prepare a transcript of the record in the above entitled cause and file the same in the office of the Clerk of the United States Circuit Court of Appeals, Eighth Judicial Circuit, in the City of St. Louis, in the State of Missouri, under the error proceedings perfected in said Court, and including

134 in said transcript, pleadings, proceedings and papers on file, and on record in your office, pertaining to said cause, enumerated as follows, to-wit:

1. Complaint or petition of plaintiff, as amended.
- 1A. Reply of Plff. to Answers of Defendants.
2. Bill of exceptions.
3. Verdict of the jury.
4. Trial proceedings.
5. Judgment entered by the Court for the defendants.
6. Petition for writ of error.
7. Order allowing writ.
8. Assignment of errors.
9. Writ of error.
10. Original citation with service.
11. Bond.
12. Præcipe for record.

Said transcript to be prepared as required by law; the rules of this court and the rules of the Circuit Court of Appeals, to have the same on file in the office of the Clerk of the Circuit Court of Appeals, at St. Louis, in the State of Missouri, on or before the 10th day of August, 1921.

C. P. ANDERBERY AND
BROWN,
BAXTER & VAN DUSEN,
Attorneys for Plaintiff.

Service of this præcipe is hereby acknowledged this 11th day of June, 1921.

JOHN J. SULLIVAN,
*Attorney for Defendants Except A. H. Blank,
Blank Enterprises, and C. H. Holah;*
ARTHUR F. MULLEN,
*Atty. for A. H. Blank and Blank
Enterprises, and C. H. Holah,
Attorneys for Defendants.*

Endorsed: Filed Jun. 13, 1921. R. C. Hoyt, Clerk.

135

(Bond on Writ of Error.)

Know all men by these presents, That we, Charles G. Binderup and United States Fidelity and Guaranty Company of Baltimore, Maryland, are held and firmly bound unto Pathé Exchange, Inc., Pathé Exchange, Inc., of Nebraska, Exhibitors Mutual Distributing Corporation, Famous Players-Lasky Corporation, Fox Films Corporation, Select Pictures Corporation, Goldwyn Pictures Corporation, First National Exhibitors Circuit, Inc., A. H. Blank, A. H. Blank Enterprises, Vitagraph-Lubin-Selig-Essanay, Inc., W. W. Hodkinson Corporation, Metro Pictures Corporation, Universal Film Exchanges, Incorporated, Enterprise Distributing Corporation, Fontenelle Feature Film Company, Incorporated, Globe Film Company, Hall Mark Pictures Corporation, Omaha Film Board of Trade, Harry D. Graham, Sidney Meyer, William F. Coleman, Charles W. Taylor, James H. Calvert, Eugene N. Blazer, Samuel A. McIntyre, Edmund J. MacIvor, Charles L. Peavey, C. Earl Holah, Max Wintraub, Maude E. Larson, Thomas E. Delaney, Herbert K. Moss, Robertson-Cole Distributing Corporation, and Harry F. Lefholz defendants, in the full and just sum of \$250.00, to be paid to the said defendants and heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves and heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals and dated this 14th day of June in the year of our Lord, One Thousand Nine Hundred Twenty-one.

Whereas, lately at the April, 1921, term of the United States District Court for the District of Nebraska, Omaha Division in a suit

depending in said Court between Charles G. Binderup, plaintiff, and the above-named defendants, judgment was rendered against the said plaintiff and the said plaintiff has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendants citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Charles G. Binderup, plaintiff, shall prosecute said writ of error to effect, and answer all damages and costs if he fails to make
 138 good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of

CHARLES G. BINDERUP,
Principal.

[Corporate Seal.]

UNITED STATES FIDELITY &
 GUARANTY CO. OF BALTI-
 MORE, MARYLAND,

By C. P. ANDERBERY,
Its Atty. in Fact, of Minden, Neb.

Approved by

J. W. WOODROUGH.

Endorsed: Filed Jun. 18, 1921. R. C. Hoyt, Clerk.

(Stipulation as to Additional Matter to be Included in Transcript on Writ of Error.)

Between the parties hereto, it is agreed:

1. That the præcipe for transcript heretofore filed in this case shall be enlarged so as to cover and include therein: (a) the answer of defendant Board of Trade; (b) one answer of the corporate defendants other than the Board of Trade; (c) one answer of an individual defendant; (d) all addenda to other answers; and (e) this stipulation.

2. That the answer of any individual defendant so included in the transcript shall be accepted as a type of the answers of all individual defendants, and the answer of any corporate defendant, other than the Board of Trade, shall be accepted as a type of the answers of all corporate defendant- other than the Board of Trade.

3. Such answers included in the transcript are so included at the request of defendants, and all costs and expenses incident to and resulting from such inclusion shall be taxed to and paid by the defendants.

EUGENE N. BLAZER,
*Attorney for Defendant Board of
Trade and All Individual Defendants.*

ARTHUR F. MULLEN,
*Attorney for A. H. Blank, Blank
Enterprises, and C. Earl Holah.*

JOHN J. SULLIVAN,
*Attorney for All Answering Corporate
Defendants Other Than Board of Trade.*

C. P. ANDERBERY AND
BROWN,
BAXTER & VAN DUSEN,
Attorneys for Plaintiff.

Endorsed: Filed Jul. 6, 1921. R. C. Hoyt, Clerk.

(Additional Præcipe for Transcript.)

To the clerk of said court:

Please prepared and transmit as part of the transcript, in accordance with the stipulation filed this day, the following papers and proceedings, to-wit:

- (a) The answer of defendant Film Board of Trade;
- (b) Answer of Metro Pictures Corporation;
- (c) Answer of Eugene N. Blazer;
- (d) All typewritten addenda to all other answers; and,
- (e) Stipulation of parties filed this date.

Dated this 6th day of July, 1921.

EUGENE N. BLAZER,
Attorney for Board of Trade.
ARTHUR F. MULLEN,
*Attys. for Defts. Blank, Blank
Enterprises, and C. Earl Holah.*
JOHN J. SULLIVAN,
Atty. for All Other Answering Defts.

Endorsed: Filed Jul. 6, 1921. R. C. Hoyt, Clerk.

(Clerk's Certificate to Transcript.)

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, R. C. Hoyt, Clerk of the District Court of the United States within and for the District of Nebraska, hereby certify that pursuant to the foregoing writ of error and in obedience thereto, and in compliance with the [Precipe] filed in behalf of the plaintiff in error, and the [Precipe] filed in behalf of the defendants in error, copy of each shown at pages — and — hereof, the foregoing record
 138 has been made, and that same is a true and faithful transcript of the pleadings and proceedings on file and of record in said court, as mentioned in said [precipes] and as indicated in the foregoing index, in the case of Charles G. Binderup vs. Pathe Exchange Inc., Case No. 850 Law, Omaha Division. That copies of the writ of error and Citation, duly certified, have been lodged and remain in my office as such Clerk.

Witness my hand and the seal of said Court at Omaha in said District this 3rd day of August, A. D. 1921.

[Seal U. S. Dist. Court, Dist. of Neb., Omaha Div.]

R. C. HOYT,
Clerk,

By JOHN NICHOLSON,
Chief Deputy.

Filed Aug. 9, 1921.
 E. E. KOCH,
Clerk.

139 *Stipulation for Supplemental Record.*

In the District Court of the United States for the District of Nebraska,
 Omaha Division.

Law. 850.

CHARLES G. BINDERUP, Plaintiff,

VS.

PATHE EXCHANGE, INC., et al., Defendants.

It is hereby stipulated and agreed by and between the parties hereto that the record of this cause, pending on error proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, shall be supplemented by including therein a certified transcript of the corrected judgment entry in this cause made on the 5th day of November, 1921, and by further including therein a copy of the

opinion of the court filed in said cause, together with this stipulation; that the cost of printing the supplemental record, in so far as including a copy of the judgment entry and this stipulation shall be paid by the plaintiff in error, and the cost of printing the opinion of the court for the supplemental record shall be paid by the defendants in error.

Dated Nov. 5, 1921.

C. P. ANDERBERRY AND
BROWN, BAXTER & VAN DUSEN,
Attorneys for Plaintiff.
ARTHUR F. MULLEN,
JOHN J. SULLIVAN,
Attorneys for Defendants.

Endorsed: Filed No. 5, 1921. R. C. Hoyt, Clerk.

(Judgment of Dismissal Nunc pro Tunc Nov. 5, 1921.)

In the District Court of the United States for the District of Nebraska,
Omaha Division.

Law. No. 850.

CHARLES G. BINDERUP, Plaintiff,

vs.

PATHE EXCHANGE, INC., et al., Defendants.

At this time, to-wit: November 5, 1921, it being brought to the attention of the court that the final judgment rendered herein April 20, 1921, was not, through an inadvertence of the clerk, fully spread upon the court journal,

Wherefore, it is considered and adjudged nunc pro tunc, that judgment be and hereby is entered upon the verdict herein in
140 favor of the defendants and against the plaintiff, and that this cause be and hereby is dismissed and that plaintiff pay the costs, and that defendants have execution therefor.

It is further ordered and adjudged that the record of this cause pending in error proceedings in the United States Circuit Court of Appeals for the Eighth Circuit shall be supplemented by a certified transcript hereof and of the Court's opinion.

J. W. WOODROUGH.

Endorsed: Filed Nov. 5, 1921. R. C. Hoyt, Clerk.

(Memorandum Opinion of the District Court.)

By the Court, J. W. WOODROUGH, District Judge:

I have reached the conclusion here that the motion should be sustained; and that upon two grounds: first: that it is not shown with

any sufficient clearness that the complaint of the plaintiff is one over which this Court has jurisdiction; second: the petition does not show with any sufficient clearness or certainty any combination or conspiracy for an illegal purpose or any combining together in concert to use illegal means, sufficient to justify the court in proceeding further with the trial of the case.

I find the petition to be vague and uncertain and largely dealing in mere generalities and conclusions, and construing the allegations of the petition strongly against the pleader, which I conceive it to be the duty of the Court to do at this stage of the case, I do not find a case of unlawful conspiracy or combination in restraint of trade made out on paper, or a state of facts made out on paper, as explained and elaborated by the opening statement of counsel, sufficient to justify the exercise of jurisdiction by the Court.

In the description of plaintiff's own business, as to what his own business was that he claims to have built up, I find much indefiniteness and uncertainty as to at least a considerable part of his business. He describes it as being that of "selecting and distributing films and advertising matter," but how he got that business and under what terms he got such films and advertising matter so as to come within that very vague and general description is not sufficiently set out to apprise the Court of just what he means.

141 As to the business that he conducted in his own moving picture houses, his allegations as to the acts of conspiracy and combination claimed to have injured that business are not made with that clearness and certainty that is requisite surely in this kind of a case. This is the kind of a case that must be made out upon a sufficiently special declaration of facts so that without resorting to mere conclusions or generalities the Court may say that there are specific acts, specific things done in concert and specific things concerted upon affecting directly the plaintiff. That is practically impossible to do on this petition and arrive with any certainty at the exact nature of the plaintiff's claim, nor can you construe his allegations as they should be construed, without leaving inferences open under which he could not recover. If there are fair inferences to be drawn from his pleadings which would not justify his recovery or would defeat recovery these fair inferences must be indulged and the case must proceed no further until the allegations are of such specific certainty as to disclose first, clearly and completely, the jurisdiction of the Court, and then the wrong within the jurisdiction of the Court which entitled plaintiff to recover damages.

Now as to plaintiff's own movie houses his claims are that he procured his films, which are the physical properties that he uses in his business, he procured them from men in Omaha. He says that frequently those men in Omaha had to send out for them to other states, from which you can only infer that the general course of business was that they were physically here in Omaha. That is the way his business was conducted, by procuring certain commodities that were physically here, and making a certain temporary use of those under contracts which he does not very particularly describe. He does allege that he had certain—apparently, so far as his plead-

ings are concerned—isolated contracts of substantially the character that he sets out in the exhibits, but as to whether his business, which is the thing damaged, and his power to do business, whether it was built up on those contracts is not alleged in the petition, but merely that there was among other things certain contracts of that character; but as to the general business the allegation is that the films, the physical films, were procured from parties here in Omaha and it is further alleged that because of the way in which the moving picture business has been built up and operated throughout the country Omaha was apparently at all times that he was in the business the only place that he could procure them.

142 Now there are comparatively few paragraphs that can be deemed to be descriptive of details of the business involved, either on the part of the plaintiff or that of the defendants—very few such paragraphs. There are some isolated acts set forth in certain paragraphs concerning the defendants which appear to me to have no relevancy to a claim of this kind as, for instance, where the plaintiff alleges that on a certain occasion certain defendants threatened to “bust him up in business” by going into the business themselves in close proximity to himself. Now the fact that such threat was made towards him I can’t see how it can have any relevancy in a suit of this kind, yet that takes up quite a lengthy paragraph in this petition.

Insofar as the manner of plaintiff’s business is disclosed the allegations are all susceptible to the construction and inference that plaintiff’s business was done by the procuring of the physical films and physical advertising matter right here in Omaha. These were commodities that were not at the time of his dealings with these defendants in any sense interstate commerce commodities locally possessed and locally handled by men responsible and accountable absolutely here in Omaha, men who had, as is fairly inferable from the petition, much to do with the particular property, and so far as the plaintiff and those similarly situated to himself are concerned, much to do in the State of Nebraska concerning that property; letting one exhibitor have it for a short time on certain terms then another exhibitor have it for another specified time and so on, but entirely eliminating any fair claim that the merchandise or commodity, the physical film was in any sense shipped from a foreign state to this plaintiff, or that it came to this plaintiff in any wise in the direct or uninterrupted current of interstate commerce.

The jurisdictional question, however, I do not conclude finally without regard to the complaint as a whole. The complaint as a whole, it seems to me, strengthens the conclusion and it says in effect as regards the defendants’ operations that they, certain of them, manufacture these commodities these films. They distribute them through the country and they establish branch offices in different places throughout the country and from the branch offices their officers and agents at the different branches accomplish distribution through certain territory; a condition which, so far as the petition is concerned, existed at the time plaintiff claimed he was building

up a profitable business, the subject of this suit. But there
143 are general allegations that refer to this system called the zoning system, as being the result of a combination and conspiracy among the defendants in restraint of trade. But how it came to grow up, how it came to be a conspiracy, what unlawful means were resorted to, or what unlawful purposes were put in force and effect in order to justify a bald conclusion that it did so result or by what kind of combination or conspiracy does not appear in the petition. So far as the petition is concerned these zones may have grown up in the ordinary course of trade, it being apparent even from the basic allegations of the petition that a business of this kind, consisting of permission to use these films for this purpose, under these circumstances, had to grow up, if at all, by means of widely extended co-operation among many different men in different places and acting for different purposes in different ways; but as to what acts of conspiracy or what acts of criminality were committed in building up that system of exchanges you would have to guess at it entirely from this petition. That kind of allegation does not justify the maintenance of this sort of an action. This sort of an action requires certainty.

So far as the effort in the petition to assert unlawful acts on the part of the defendants, unlawful by reason of concert to do an unlawful thing, or something that may otherwise have been lawful by unlawful means, the gist of all those allegations is this: There is a Film Board of Trade here in Omaha and certain officers in the producing and distributing corporations are members of that Exchange. Now it is alleged that that Exchange was organized for the purpose of destroying plaintiff's business and of injuring his credit and reputation, but in the sentence or two following that it is alleged that its plan of operation was as set out in its articles of incorporation, and presumably, by-laws, although by-laws are not mentioned. Now when we examine the so-called plan that the plaintiff attributes to the defendants, which he says was entered into for the purpose of destroying his business the plan does not disclose any such thing at all. It discloses an organization whose articles are perfectly legal and perfectly proper and apparently provide for a necessary co-operation in the conduct of the industry. That being so, the general allegation of the petition that it is organized to destroy the plaintiff's business becomes mere surplusage, a conclusion that does not justify the introduction of evidence to support it. If this association has some illegal provisions in its articles or by laws, it being admitted in the pleadings that it works according to the plan of its organization, and if the pleader intended to say that the plan and object of its articles were merely
144 colorable, that it was planned for an unlawful purpose they should set out where, which one of its by laws it intended to disregard and then the facts to show that in its operation it did so disregard them, but a mere bald declaration that an apparently legal association was formed for the purpose of destroying his business is not sufficient, as I understand the law, to justify the introduction of evidence and to proceed thereon.

This association had charges before it against this plaintiff. The bald allegation is that they were false charges. What they were, how they affected the plaintiff, wherein they were false, how he knew they were false, what the basis is of that charge of falsity nowhere appear in the petition, because it does not say what the charges were; a mere conclusion that they were false charges without specifying what they were or their nature or anything about that. How did he know they were false or affected his reputation? The allegation is too vague and indefinite in a case that requires certainty which most certainly does require some assurance before all these witnesses are called in, and before lengthy court proceedings are started at the behest of this plaintiff, that we know just what he is claiming.

Then charges are made that an unfavorable report was made by the Association against this plaintiff as evidenced by the sending to its members of blue cards. Then it is stated that he came before the Association and argued the matter with them; that there was a resolution passed that so far as the business was concerned that he referred to as "selecting and distributing films," that the association would discontinue that, or recommend the discontinuance of that business. Well, why not? What is there shown in the petition unlawful about that? It sufficiently appears in the petition that these men themselves were manufacturers of films and that they have offices here in Omaha for the purpose of distributing these films to bona fide users of them, owners or operators of moving picture houses. What is there illegal or unlawful about this association inquiring into the fact of the selecting and distributing of films and resolving that so far as they were concerned they would no longer recommend to their members to contract with him to that end? There is no allegation in the petition from which it can be inferred that that was an unlawful thing for them to do either singly or in concert so far as I can see. Then they resolved further in that Exchange that as to his own moving picture houses he should introduce proof that they were his houses, and that he should give a moderate security, having regard to the extent

145 of business (claimed to have run up into the thousands of dollars), that he give security of one thousand dollars to abide by the rules of the Exchange. Well, no rules are pointed out which are oppressive or unreasonable to abide by, it is not shown that the executing of such a moderate sized bond as that or the recommending of it to those members—nothing to show that that is unreasonable, oppressive or unlawful. No fact, at any rate, is brought out in the petition from which that could be fairly inferred. The petition does not attempt to point out any by laws or any articles of this association that made that ruling binding upon other parties engaged in the trade or as to what, if any, methods were to be restored to to bind the members of the trade. The showing is that others not members of the association sympathized with that ruling of the exchange, and adopted it for their own. It seems to me a far cry to say upon the allegations that are made here that such action is [lawful] in itself, or criminal in any way, or criminal means

employed, or that it would be an unlawful purpose to compel this plaintiff to give that moderate or nominal security for the transaction of the kind of a business this petition shows him to be engaged in, a business involving the handling of other people's property, the holding for brief periods of films that are valuable and handling those films and sending them around to other people. That a reasonable security should be required on that and should be recommended by this board does not state the kind of a case, it seems to me, that is cognizable under the Sherman Act.

As to how the plaintiff's credit or reputation was involved, it nowhere appears in the petition because the nature of the charges are not shown.

I find in this case no analogy to those very numerous cases that have been cited, nor pretending to have read as many of them as I would like to,—feeling somewhat the necessity of acting promptly in a case where a jury is impaneled and it being necessary to proceed—I have read as many as I could and I do not find any case which presents an analogy to support this kind of a claim. Cases in abundance have been cited where an association of either manufacturers or jobbers have been shown to have some rule, some by-law, which in its operation is a restraint of trade as to the party complaining, unlawful and unjust, but I find no place where the gist of it as it is here apparently so far as I can judge the vague allegations of the petition, the gist of it is an action of an association governed admittedly by articles of association and probably by by-laws, but no article or by-law pointed out and shown to have been
 146 put into general operation and shown to have restrained trade and commerce between the states and particularly to have damaged the plaintiff.

It does sufficiently appear in the petition that the various members of this exchange and other manufacturers and producers of motion picture films were competing with each other. Plaintiff shows in his petition that when he was contracting with one group of them other groups came to him and sought part of his business, showing open competition among themselves.

The motion will be sustained and an exception will be allowed plaintiff.

Endorsed: Filed Nov. 5, 1921. R. C. Hoyt, Clerk.

(Clerk's Certificate to Supplemental Transcript of Record.)

UNITED STATES OF AMERICA,
 District of Nebraska, ss:

I, R. C. Hoyt, Clerk of the District Court of the United States, within and for the District of Nebraska, hereby certify the foregoing to be a true and correct copy of the Stipulation for Supplemental Record, Judgment of Dismissal Nunc Pro Tunc and Opinion of the Court in Case No. 850 Law, as the same appears on file and of record in my office.

Witness my hand, and the seal of said Court, at Omaha, in said District, this 8th day of February, A. D. 1921.

[Seal United States District Court, District of Nebraska,
Omaha Division.]

R. C. HOYT,
Clerk.

Endorsed: Filed in the U. S. Circuit Court of Appeals on Nov. 9, 1921.

147 (SECOND SUPPLEMENTAL TRANSCRIPT OF RECORD.)

EXHIBIT A.

Articles of Incorporation of Omaha Film Board of Trade, Inc.

We, the undersigned, for the purpose of forming a corporation under and pursuant to the laws of the State of Nebraska, do hereby associate ourselves as a body corporate, and do hereby adopt the following Articles of Incorporation.

Article I.

The name of this corporation shall be the Omaha Film Board of Trade, Inc.

Article II.

The principal place of transacting its business shall be in the City of Omaha, Douglas County, Nebraska.

Article III.

The general nature of the business shall be to promote acquaintanceship and good will amongst those engaged in the film and picture business, to promote the interest and elevate the standard of the motion picture and film picture in this section of the country; to acquire and disseminate valuable business information and maintain and operate a trade and information bureau and exchange for the collection and supplying of information relative to the motion picture and film industry including the credit and standing of firms, corporations and individuals, as to available unemployed labor, and as to other subjects of trade interests, to adjust controversies and business disputes among those engaged in the motion picture business, to align the film business with the other forces or activities of the community, tending towards the [community's] advancement patriotism, intelligence and good citizenship.

The plan of operation of this corporation generally shall be to have it composed of those persons or corporations engaged in the film industry, particularly motion picture film distributing companies corporations or individuals engaged in that business represented by

the managers or one of the executive heads of said companies. It shall issue shares of stock evidencing the interests of the members therein, which shares of stock or the interest of any member of the corporation shall be non-assessable and non-transferable, excepting to those companies, corporations or individuals first approved of
148 by the membership and it may prescribe and collect dues, assessments and fines. Membership in the corporation and the shares of stock therein, shall continue and be valid and in force only so long as the member [of] holder of such stock fulfills the following conditions, to-wit: 1—Continues to be affiliated with the corporation. 2—Is connected with some branch of the film or motion picture business maintaining an office in Omaha. 3—Is the manager or one of the executive heads of the firm, person or corporation of the branch of the firm or motion picture business he represents. 4—Abides by and performs and respects all the terms hereof by laws, rules and regulations of the corporation effective from time to time. Provided however, if within one month or such further time as may be allowed by the membership for the happening of any breach, default or non-fulfillment of any of said conditions by any member he desires to assign or transfer his membership and share of stock to any person, firm or corporation satisfactory to the membership aforesaid, he may do so. Stated meetings of the corporation shall be had and the affairs of the corporation shall be conducted by the entire membership except whenever the corporation shall delegate any of its powers or the management of its affairs, consistent with law, to its Board of Directors, or other duly constituted committee officer, agent or employes or branch of itself.

This corporation shall be one not for pecuniary profit and in distribution of property among its members or shareholders shall be made until the dissolution of the corporation, except dividend upon its capital stock out of the net annual receipts after payment of all outstanding indebtedness.

Terms of admission to membership shall be by written application subscribed by the applicant who must be actively engaged at the time and during the time of his membership in some branch of the film industry. The applicant shall pay the sum of Ten (\$10.00) Dollars as admission fee and in payment of one share of stock and as hereunder provided at least the sum of Ten (\$10.00) Dollars monthly as dues together with such further dues, assessments or fines that may be duly assessed against him, agreeing to abide by the law, rules and regulations of the corporation.

Article IV.

The total authorized capital stock shall be Two Thousand (\$2,000.00) Dollars divided into two hundred shares of the par value of Ten (\$10) Dollars per share, all of which shall
149 be fully paid and non-assessable when issued. No member shall own more than one share of stock in the corporation.

Article V.

The time of the commencement of this corporation shall be the 17th day of April, 1919, and shall continue for a period of fifty years from said date, unless sooner dissolved by law or act of members.

Article VI.

The highest amount of indebtedness or liability to which the corporation shall at any time subject itself shall not exceed two-thirds of its capital stock.

Article VII.

The officers of this corporation shall be a President, Vice-President, Secretary and Treasurer. There may also be a Board of Directors, consisting of five members and may consist of the officers of the corporations' Counsel. The officers shall be as follows: Harry Graham, President, Charles W. Taylor, Vice-President, Sidney Meyer, Secretary, William N. Skirboll, Treasurer. The first Board of Directors shall be the officers herein mentioned and Eugene N. Blaser, corporation counsel. The officers and directors shall be elected by the share-holders at the main office of the corporation in Omaha, Nebraska, at each annual meeting of the corporation. The first annual meeting shall be held on the first Wednesday of December, 1919, and annually thereafter, and the said officers and directors herein mentioned shall hold their respective offices until the next meeting of the corporation or until their successors shall be elected and qualified.

Article VIII.

These Articles of Incorporation may be altered or amended by two-thirds vote of the members present at any annual meeting or at a special meeting called for that purpose, said manner of calling a special meeting being provided for in the by-laws of this corporation.

In Witness Whereof, we have hereunto signed as incorporators.

HARRY GRAHAM,
SIDNEY MEYER,
ARTHUR S. BAILEY,
Incorporators.

150 STATE OF NEBRASKA,
County of Douglas, ss:

On this 16th day of April, 1919, personally appeared before me, Robert J. Shields, a Notary Public, in and for Douglas County, Nebraska, Harry Graham, Arthur S. Bailey, and Sidney Meyer, to me personally known to be the identical persons who executed the foregoing Articles of Incorporation and who acknowledged the execution

thereof to be their voluntary act and deed, and the voluntary act and deed of each of them for the purposes therein expressed.

In Testimony Whereof, I have hereunto set my hand and affixed my Notarial seal in said County the day and year last above written.

[SEAL.]

ROBERT J. SHIELDS,
Notary Public.

Robert J. Shields' Commission expires May 4, 1924.

Recorded April 16, 1919, at 4:45 o'clock P. M.

FRANK DEWEY,
County Clerk.

STATE OF NEBRASKA,
Douglas County, ss:

I, Frank Dewey, County Clerk in and for said State and County, do hereby certify that I have compared the above and foregoing copy of Articles of Incorporation of Omaha Film Board of Trade, Inc., as it appears of Record in Book "E-2" of Incorporation Record on page 606 and the same is a true and correct copy thereof.

Witness my signature and the seal of said County at Omaha, this 17th day of March, A. D. 1920.

[Seal of the Court of Commissioners of Douglas County, Nebraska.]

FRANK DEWEY,
County Clerk,

By ———, Deputy.

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EXHIBIT B.

By-Laws of the Omaha Film Board of Trade.

Article I.

The name of this corporation shall be Omaha Film Board of Trade.

Article II.

The objects of the corporation shall be as set out in the Articles of Incorporation of the corporation filed with the Secretary of State, etc.

Article III.

The first annual meeting shall be held on the first Wednesday of December, 1918, and thereafter the regular annual meeting shall be held on the first Wednesday of December of each year. Special meetings may be called at any time on call of the President or upon the written request therefor to the President and Secretary by any three

members. Notice of all special meetings shall be given to each member by a notice thereof deposited in the Postoffice, postage prepaid, at least one clear day previous to the holding of said meeting, and said notice shall specify the time, place, hour and purpose of such meeting. At all meetings of the membership five members in good standing shall constitute a quorum.

Article IV.

In addition to the regular annual meeting and any special meeting that may be had, regular weekly, semi-monthly, or monthly meetings of the corporation may be had at such time as the membership may determine.

Article V.

The affairs of the corporation shall be conducted by the entire membership excepting as the corporation may delegate or empower the Board of Directors or any committee, officer, agent or employee or other branch of the corporation, and in the event of any dispute or question as to whether the membership, or the Board of Directors or any officer, agent or employee or committee shall be empowered to perform any act, the authority of the membership shall be supreme.

Article VI.

At the first annual meeting and at each subsequent annual meeting of the membership, they shall elect by plurality vote by ballot a President, Secretary and Treasurer and a Board of five Directors for the ensuing year, and they shall transact such other business as may properly come before them.

Article VII.

There shall be mailed to each member of record at his last known address, at least ten days prior to the annual meeting, excepting the first annual meeting, a notice setting out the time and place of the annual meeting.

Article VIII.

Each member shall be entitled to one vote on all questions, irrespective of the number of shares of stock he may own. Provided that any member at any meeting of the membership may vote by proxy or delegate a representative to represent such member, if said member in advance of such meeting or meetings at which such proxy or representative shall act, files with the Secretary for the corporation a notice in writing appointing such proxy or representative.

Article IX.

The Directors shall hold regular weekly meetings or such stated meetings as they may decide at such time, hour and place as they

may at a previous meeting declare, excepting that in the absence of the place of such meeting, the same shall be held at the office of the Company. Special meetings of the Directors may be called by the President or by three Directors, by giving one clear day's notice to each Director. Notice of any membership or Directors' meeting may be waived. Three Directors shall constitute a quorum.

Article X.

Vacancies in the Board of Directors for the unexpired term shall be filled by a majority vote of the members at the next monthly meeting of the membership, or at a special meeting of the membership called for that purpose. The membership or Directors themselves may declare vacant the seat of any member of its Board who shall be absent from any two consecutive regular meetings without having been previously excused, or without having in advance of any such meeting sent a written communication to the Pres. stating a good reason for his absence.

Article XI.

The Corp. may employ and procure the services of any atty. or attys. for counsel or otherwise, and when necessary for the prosecution or defense of any suits at law or in equity or otherwise,
153 and pay him such compensation for his services as it may determine.

Article XII.

1. The Pres. shall preside at all meetings of the Corp. and of the Board of Directors. He shall be ex-officio member of all committees.

2. The V. P. shall perform the duties of the Pres. in case of his absence, inability, resignation or death, and shall assist the Pres. whenever called upon.

3. The Secy. must attend all meetings, collect all moneys due the Corp. either for dues, debts, fees, assessments, fines or penalties, pay the same over to the Treas. at least once a week, taking his receipt therefor; keep a fair record of all meetings, attend to all correspondence and submit the same at meetings, when called for, give due notice of all meetings; render a report of the business and transactions of the Corp. at the annual meeting of the members; and perform such other duties as ordinarily attach to his office, or may be assigned to him by the Board of Directors.

4. The Treas. shall take charge of the money of the Corp. and deposit the same in the name of the Corp. in such bank or banks as may be directed by the Board of Directors. He shall draw the same by check only to be issued upon duly approved vouchers approved by the Pres.

He shall make an annual report of the financial condition of his term of office, and transfer and deliver all moneys, books, funds and

other property in his possession to his successor. He shall provide a bond, the amount of which shall be determined and fixed annually by the Board of Directors.

5. Any officer who shall neglect his duties or become incapacitated may be removed at any meeting of the Corp. by a majority vote of the members present.

Article XIII.

The Pres. shall appoint such committees as the membership or Board shall authorize, unless the motion or resolution creating such committees otherwise designates the manner of appointment or election thereof.

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Article XIV.

1. The membership shall be limited to one member or representative from any Corp. Company or individual engaged in the film business in any of its branches, or in the film accessory business provided any of such businesses maintain offices in Omaha, Nebraska.

2. Three negative votes or blackballs shall be sufficient to reject any application for membership.

3. Membership in the Corp. and the shares of stock therein, shall continue to be valid and in force and effect only as long as the member or holder of such stock fulfills all the following conditions, to-wit:

a. Continues to be affiliated with the Corp.

b. Is connected with some branch of the film or motion picture business maintaining an office in Omaha.

c. Is the manager or one of the executive heads of the firm, or Corp. of the branch of the film or motion picture business he represents.

d. Abides by and performs and respects all the terms thereof. By laws, rules and regulations of the Corp. effective from time to time. Provided however, if within one month, or such further time as may be allowed by the membership, from the happening of any breach, default, or non-fulfillment of any of said conditions by any member, he desires to assign or transfer his membership and share of stock to any person, firm or Corp. satisfactory to the membership as aforesaid, he may do so.

Article XV.

It is expressly understood by all members, and in the application for membership it is acknowledged, that membership herein is a valuable concession and personal privilege, and that the same is not assignable or transferrable without the consent first being obtained of the membership and the consent as respects the assigns or transferee. Such assignee or transferee must possess all of the qualifications as respects one applying for original membership.

Article XVI.

If a member fails to pay his share of expenses, debts, dues, assessments, or fines due from him personally, or from any Corp., Association, or Co-partnership in which he may be interested, or is a
155 member of, or is connected with, and shall neglect and fail to pay said sum or sums so due, within a period of 60 days after notice to do so, or shall fail to comply with the terms and provisions of these By-laws or of the Certificate of Incorporation, or of any law or resolution of this Corp., the same shall constitute an infraction thereof, and the said member guilty thereof shall be punishable by a fine of not more than \$100.00 or by suspension or expulsion from membership of this Corp.

Article XVII.

This Corp. shall withdraw from any fund on hand a sum sufficient to defray the expenses of incorporation, and all expenses incident and necessary to the furnishing and [supplying] of Headquarters and offices and materials for the proper carrying out of the objects of this Corp. as well as the payment of salaries of officers and employees; and thereafter shall create a fund, to be known as the "General Fund," which said fund shall be supplied by all moneys derived from initiation fees, dues, fines, donations or assessments, etc.

Article XVIII.

Each member is to be held personally responsible for the acts of his servants, agents or employees, or the acts of the Corp., Ass., or Copart., of which he is a member, financially interested in, or connected with, directly or indirectly; the said member admitting at the time that he is in a position to know and control the course and conduct of his said agents, servants or employees, and to know, or to know and control the course of conduct of any Corp., Ass., or Copart. of which he is member, financially interested in, or connected with, and of its agents, servants or employees.

Article XIX.

The Corp. shall have full power and authority to hear and determine all matters relative to and arising out of violations or infractions of these by laws, or the articles of Incorporation, and shall have authority after due hearing had, to punish any violation or infraction thereof, either by fine, reprimand, suspension or expulsion of the members guilty of such violation or infraction when not otherwise specially provided for in these by laws or otherwise.

Article XX.

For the successful operation of the Corp. it is vitally important that the members attend each regular and special meetings. Therefore,

156 to insure full attendance no detail of any meeting shall be imparted to any absent member unless said member was absent because of illness or absence from the city, and as a penalty for the absence of the member from any two consecutive meetings without excuse satisfactory to the membership, the Secy. shall address a letter direct to the home office of the member so at fault advising such home office of the negligence of such member.

Article XXI.

1. That for the purpose of defending its members against imposition, wrongful failure to lift C. O. D. shipments of films, the taking of unfair advantage of film service, etc. the Corp. may establish in the Office of the Secy. of the Board a clearing house of protective information.

2. That any such information on file with the Secy. desired by any member of the Corp. in good standing shall, on request, be furnished free of charge.

3. That when any acts against which it is the purpose of the Corp. to protect its members, as hereinbefore stated, come to the attention of any member of the Corp. they shall be reported immediately in writing, on forms furnished the members, to the Secy. of the Corp. This information is to be sent immediately to the members of the Board of Trade.

4. That the members of the Board shall keep the Secy. informed of any developments in any case previously reported to him and shall report the final disposition of the case.

5. That the Secy. shall be notified immediately of any change of address or of the opening of a new theatre by any party who has been so reported to him.

6. That it shall be the duty of the Secy. to write to every party committing said acts, and so reported to him, requesting said party to state his reasons for such action.

7. That each member of the Board, shall, on request, furnish to the Secy. in connection with the said purposes, such information regarding existing and prospective accounts as may be requested by him.

8. That all information furnished to any member of the Corp. is for his use solely to protect him against said practises and to aid him in determining the propriety of extending credit or the value and condition of an existing credit, and shall be held in strict confidence and not revealed by him to the person reported nor to any other person.

157 9. That [the] irrespective of the wishes or request of other members of the Corp. each member thereof shall be free to grant credit to any person.

10. That all expenses incident to the obtaining and furnishing of regular credit information shall be paid by the Corp.

11. That all expenses incident to the obtaining of information requiring special investigation shall be, in each case, paid by the member or members requesting same.

Article XII.

In addition to the share of stock the market value of which may be determined from time to time by the membership, each member shall pay monthly contributions or dues amounting to \$10.00 payable in advance.

Article XXIII.

Should the means herein provided for the payment of the debts and the liabilities of the Corp. prove insufficient the membership is improved to levy and assess on all members a reasonable sum of money, to be paid at such times and in such manner as it may determine. Provided however, that written notice of at least two clear days is given to all members that such assessments will be proposed and voted upon, such notice to designate the amount of such assessment, purpose and date of meeting, when the same will be considered and voted upon.

Article XXIV.

1. Fines and penalties to be paid and inflicted for a breach of these bylaws, or any laws of the Corp. except these where different penalties are expressly provided, shall not exceed \$100.00 for each and every offense.

2. If the gravity of the offense is decreed sufficient the Corp. may, by a 2/3 majority of those voting, expel the member, provided at least 2/3 of the membership are present and voting. Provided, further, notice and trial is had as set out in the next paragraph. An expelled member, if he desires to re-enter this Corp. must take application and follow the procedure required of [an] new member, and first pay all debts, dues, assessments or fines due from him to this Corp., and receive a vote of a majority of the members of the Corp. present at the meeting at which his application is heard.

Article XXV.

At the hearing of any dispute or the trial of any member relative to suspensions, [expulating] or otherwise, the following procedure shall be had:

a. The Pres. shall cause the accused and the accuser to be cited to appear before the Corp. at their next meeting and the substance of the complaint shall be furnished to the accused at least three days

prior to such meeting by mailing or delivering the same to him, prepaid, addressed to his place of business.

b. The Pres. shall appoint a special committee to hear the facts after trial before it, and report its findings at the next meeting of the Corps. with its recommendations, and the Corp. by a 2/3 vote of all present and voting shall fix the penalty.

c. Should the urgency of the case demand the Pres. may call a special meeting to fix the penalty of such offender.

d. Members and their employers and employees or any witnesses may testify at the hearing orally, upon their honor.

Article XXVI.

The Board of Directors may offer its services in trying to induce the settlement of any controversy between parties in business, or business concerns, or any disputes affecting trade and commerce, and in case the matter is favorably considered by the disputations, a special committee will be appointed to consider the questions at issue.

Article XXVII.

The Board of Directors shall devise and procure, as soon as possible after the adoption of these By-laws, a suitable seal for the Corp. which said seal shall contain the following Wording:

"Omaha Film Board of Trade, Inc."

Article XXVIII.

Any of these By-laws may be amended by a 2/3 [vots] of the members present and voting at any regular monthly meeting or special meeting of the membership, provided that notices specifying the proposed change shall have been mailed to the members at least 5 days prior to the date of such meeting.

Article XXIX.

All members who acquire shares of stock and join this Corp. on or before the — day of —, 19—, shall be deemed charter members thereof.

Article XXX.

Any member may [reaign] from membership provided he submits his resignation in writing to the membership at a regular monthly meeting or at the annual meeting thereof. [Yhe] said notice in writing shall set out the reasons for such resignation. If the same is accepted by the membership, each share of stock may be purchased back by the Corp. but in the event said resignation is not accepted, said shares of stock shall not be transferable or assign-

able, but shall be cancelled and void and of no force or effect, and all rights and privileges of said member shall cease.

Article XXXI.

Roberts' rules of order shall govern in all cases relative to matters of practice and procedure, when not covered by these By-laws or any other laws, rules or regulations of the Corp.

Article XXXII.

Each member hereby agrees to and with the other members that he will comply with all of these terms and conditions contained herein and in the Articles of Incorporation; and in case where the member is financially interested in, or connected with a firm, co-partnership or Corp. of which he is member financially interested in or connected with, and is represented by membership herein, it agrees to abide by said provisions, in return for the right of representation granted it.

In witness whereof each of the members etc.

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EXHIBIT A ATTACHED TO PETITION.

Goldwyn Distributing Corporation,

Executive Offices,

16 East 42nd Street,

New York City.

Exhibitor's Copy.

K. C. Office.

Contract No. 449.

Key No. 033.

Agreement for Goldwyn Pictures.

Agreement, made in triplicate, this 26th day of July, 1918, between Goldwyn Distributing Corporation, hereinafter referred to as owner

"the Exchange," and C. G. Binderup, lessee of and operating the Opera House Theatre, at No. — — Street, in the City of Franklin, State of Nebr., hereinafter referred to as "the Exhibitor,"

Witnesseth: for and in consideration of the mutual promises and agreements herein contained, and of the sum of one dollar, by each of the parties to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

First. The exchange agrees to furnish to the exhibitor at its above named branch office one print of each of 26 motion picture photograph number

plays known as Goldwyn Pictures beginning with the motion picture released or to be released Sept. 9, 1917, and those successively released bi-weekly thereafter, upon the terms, covenants and conditions and subject to the limitation hereinafter set forth and those printed on the reverse hereof; and hereby grants and gives to the exhibitor the right and license to publicly exhibit and display each of said prints at the above mentioned theatre but at no other place for a period and at the time specifically hereinafter set forth.

Second. The exhibitor agrees to accept and to publicly exhibit for two consecutive days the first of said prints on Sept. 27th, 1918, (No. of days) (date)

and each successive print every second Friday thereafter for a like number of days at the theatre aforesaid and to charge a minimum admission price of 25c.

161 Third. The Exhibitor shall pay to the Exchange, for the use of and the right to exhibit each of said prints for the number of days herein provided for, the sum of Ten & No/100 Dollars (\$10.00) for each of said prints, as follows: The amount provided to be paid for the last print to be furnished hereunder upon the signing of this agreement; thereafter the sum herein provided to be paid for each of the other prints, in advance of the day of its delivery. The exchange shall have the right, at its option, of deducting from any credit established in favor of the Exhibitor, any sum or sums which may be payable to the Exchange hereunder and / or the amount of any damages or liability, liquidated or unliquidated, which may be incurred by the Exchange as the result of any breach of any of the terms, covenants or conditions of this agreement on the part of the Exhibitor to be performed, and to apply the same in payment of such sum or sums or such damage, as far as the same is applicable, and the Exhibitor shall be liable for any deficiency; it being understood, however, that any such deduction and application by the Exchange from such credit shall not be construed as a waiver by the Exchange of any default or breach of the terms hereof by the Exhibitor or of any legal remedy of the Exchange.

Fourth. The Exchange agrees to pay to the Exhibitor, monthly, interest upon the sum paid by the Exhibitor for the last print to be furnished hereunder, at the rate of four per cent (4%) per annum from the date of such payment to the respective days of exhibition of said last two prints by the Exhibitor, or, if said sum shall have been previously applied by the exchange in payment of any sum due or of any damage or liability incurred as herein provided, to the date of such application.

Fifth. The Exchange agrees that the Exhibitor shall have the right to the first run of each of said prints in Franklin, Nebr.

Sixth. The provisions hereof with relation to the time of payment, the exhibition and return of each of said prints and the covenants of the Exhibitor contained in Section Second and (a), (b), (c) and (d) printed on the reverse hereof, shall be deemed as of the essence of this agreement.

162 Seventh. It is agreed that this contract shall not be binding upon the Exchange unless countersigned and approved on its behalf by one of its officers in the City of New York,

Note. and that there are no conditions, verbal or otherwise, not named and clearly expressed herein and that this constitutes the entire contract between the parties and unless otherwise hereinabove specified no exclusive right of exhibition and no specific run is granted.

In witness whereof the parties hereto, if individuals or a partnership, have hereunto set their hands and seals, and if corporations, have caused their corporate names to be signed and their corporate seals to be duly affixed by their proper officers duly authorized, on the day and year first above written.

GOLDWYN DISTRIBUTING CORPORATION,
By RICHARD ROBERTSON, (*Manager*);

— — —, [L. s.]

(*Exhibitor*),

By C. G. BINDERUP.

Countersigned and approved at New York City Aug. 7, 1918.

GOLDWYN DISTRIBUTING CORPORATION,

By (Signature illegible)

Vice-Pres.

Cancellation Clause: Either of the parties to the annexed agreement may, by written notice sent to the other by registered mail within ten days after the delivery of One of the pictures therein provided for, limit the number of pictures to be thereafter delivered to One additional picture and upon the delivery of said additional picture said agreement shall be terminated with the same effect as if said additional picture were the last of all of the pictures therein provided for. Such notice shall be addressed to the parties at their respective addresses in said agreement mentioned.

163 The foregoing attached to and made a part of the agreement dated the 26 day of July 1918.

GOLDWYN DISTRIBUTING CORPORATION,
By RICHARD ROBERTSON, (*Manager*);

— — —, [L. s.]

(*Exhibitor*),

By C. G. BINDRUP.

Aug. 7, 1918.

(Signature illegible),

Vice-Pres.

(On the reverse side of the foregoing contract appeared the following matter:)

(a) The Exhibitor agrees to deliver to the Exchange, and to pay the cost thereof, at its branch office, if in the same city in which the Exhibitor's theatre is located, or, if the Exchange maintains no office in said city, to the office of the express company or other carrier designated by the Exchange, or, if an express company or other carrier is not so designated, to the nearest proper express company or to the most rapid carrier service, immediately after the close of the last performance upon the last day of exhibition of the respective prints as herein provided for, each of the prints in the metal can and in the shipping case furnished therewith together with all material or other property furnished with or incident thereto, correctly and legibly addressed for re-shipment in accordance with direction and advices previously given or to be given by the Exchange, and to prepay the express or other carriage charges therefor. All express or other carriage charges incurred in the shipment of each of said prints to the Exhibitor shall be borne and paid by the Exhibitor. In the event of the Exhibitor's failure to so deliver or ship any of such prints as herein provided, or the Exhibitor using or retaining any of such prints beyond the period herein provided for, or the Exhibitor failing in any way to comply with the directions of the Exchange as aforesaid, the Exhibitor covenants and agrees to pay to the Exchange for such failure, use or retention, an amount equal to double the pro rata charge herein made for each and every day or part thereof, of delay in delivery or shipment or use or retention, and, in addition, to be fully liable for all damage resulting to the Exchange by reason of such failure to deliver or of such unauthorized use or retention, and shall further hold the Exchange harmless on account of any damage, liability, loss or action on account thereof.

164 (b) All advertising material, such as lithographs, slides and photographs used by the Exhibitor in connection with the exhibition and exploitation of each of said motion pictures, shall be purchased by the Exhibitor from the Exchange, and the Exhibitor agrees not to purchase directly or indirectly such advertising material, lithographs, slides and photographs from any other person, firm or corporation.

(c) The Exhibitor agrees in case any print or part thereof is damaged, injured or destroyed by fire or otherwise, with or without the fault or negligence of the Exhibitor, while such prints of the prints, or any part thereof, furnished to the Exchange, upon demand, to the Exchange, as liquidated damages, the sum of eight cents (8c.) for each and every lineal foot of such print or part thereof damaged, injured or destroyed; and the Exhibitor further agrees that in case of such damage or destruction, to give immediate notice of the fact to the Exchange at its above named office.

(d) The Exhibitor agrees that neither the Exhibitor nor the Exhibitor's agents, servants or employees, shall make, manufacture or print duplicate negatives or positive prints of the prints, or any

part thereof, furnished to the Exhibitor under the terms hereof, nor cause or permit the same to be done, and that the Exhibitor, the Exhibitor's agents, servants or employees will exhibit each of said prints furnished by the Exchange hereunder without alterations or trimmings and will exhibit the title preceding the picture, the notice of copyright thereof and the trailer, if any, following, and that neither the Exhibitor nor the Exhibitor's agents, servants or employees will exhibit or cause to be exhibited any of said prints or parts thereof in any other place nor at times other than as provided for in this agreement.

(e) It is agreed that no right, title, interest or ownership in and to any of the prints aforesaid, or any other personal property of any description incident thereto or connected therewith and furnished hereunder, shall pass under this agreement, but shall remain and be vested in the Exchange unaffected thereby, and the Exhibitor shall receive therein only the right of exhibiting the same in the theatre or place on the days specified herein and not otherwise and shall have no other rights therein whatsoever.

(f) The Exchange shall not be liable for failure to make delivery, or delay or delivery of any of said prints, caused by the elements, strikes, riots, insurrection, war or a condition of war, postal, 165 express, carrier or railroad service, or by reason of any decree or order of any Court or lawfully constituted authority, or for any cause beyond its control, and it is agreed that the failure of any other Exhibitor to return to the Exchange, or to forward in accordance with advices given in compliance with an agreement therefor, any print delayed in delivery to the Exhibitor herein named shall be deemed to constitute a case beyond the control of the Exchange within the meaning of this agreement. In no event shall the Exchange be liable to the Exhibitor on account of delay in delivery of any of said prints, in accordance with the terms hereof, for more than an amount equal to the pro rata charge per day for each day lost or for failure to make delivery beyond repayment of the amount paid by the Exhibitor for the use of such print.

(g) In the event of a breach by the Exhibitor of any of the terms, covenants or conditions of this agreement on the part of the Exhibitor to be performed, the Exchange shall have the right forthwith, without notice, to revoke the license granted to the Exhibitor and every part thereof, and upon such revocation all rights of any nature, kind and description herein granted to the Exhibitor shall immediately cease and determine and shall forthwith revert to the Exchange. Upon such revocation, or irrespective of such revocation upon any print furnished hereunder being found anywhere other than at the theatre or place hereinbefore designated, the Exchange shall have the right to retake such print wherever the same may be found. This provision, however, shall not be construed as a waiver by the Exchange of its legal or equitable rights in the premises for damages or otherwise, but shall be in addition thereto.

(h) It is expressly understood and agreed that this agreement and each and every term and condition thereof shall not be assignable by the Exhibitor without the written consent of the Exchange first had and obtained, and that this agreement and each and every term and condition thereof shall, for all purposes, be deemed an agreement made, executed and delivered in the State of New York and shall be construed according to the laws and statutes thereof. All differences and disputes arising hereunder, involving claims by the Exhibitor against the Exchange, shall be prosecuted solely in the courts of the State of New York, to the jurisdiction of which the Exhibitor hereby submits.

(i) The Exhibitor agrees further that so long as the United States War Revenue Act of October 3, 1917, shall remain in effect, the Exhibitor shall pay to the Exchange for all film received hereunder, the sum of fifteen cents (15c.) per reel per day because of war Excise Taxes imposed upon motion picture film.

EXHIBIT C.

Artacraft Pictures.

Contract for Photoplays Starring Mary Pickford.

For Season 1918-1919.

S. C. No. —.

Contract No. 71094.

Effective with Release No. 7012.

Branch at Omaha, Nebr.

Agreement made in triplicate this 23d day of Sept. 1919, between Famous Players-Lasky Corporation, a corporation hereinafter called the "Distributor," a party of the first part and C. Binderup, an Exhibitor, operating the — Theatre, at No. — Street, Bloomington City Nebr. State, hereinafter called the "Exhibitor," party of the second part, Witnesseth: That in consideration of the mutual covenants herein contained and of the advance deposit agreement of even date, the parties hereto agree as follows:

First. The Distributor agrees that it will during the year commencing on or about the 1st day of September, 1918, release Two motion pictures, in which the above named star shall enact the leading role; and it hereby gives and grants to the Exhibitor the license to exhibit one copy of each of said films, at the above named theatre only, for Two successive days, and the Exhibitor agrees to pay for such license the sum of Fifteen (\$15.00) Dollars, per picture, such payments to be made at least seven (7) days before the date set in the notice hereinafter mentioned to be given to the Exhibitor before the showing of each picture.

Second. The Distributor shall give at least three weeks' notice to the Exhibitor of the date or dates on which the latter shall be entitled to exhibit each of said pictures in the theatre aforesaid, and the Exhibitor agrees to exhibit said picture on the dates designated only, and to charge an actual minimum admission fee of ten cents.

Third. The Distributor agrees that it will use its best efforts to have a copy of the film, to be shown by the Exhibitor, at its nearest branch office, for delivery to the Exhibitor, in time for the
167 showing in the theatre aforesaid, on the date stated in the notice hereinbefore referred to, but the Distributor shall not be liable in any way for failure or delay in making deliveries of motion pictures in accordance with the terms hereof, by reason of accidents, strikes, fires, orders of the Court, ruling of Censors, delays of any common carrier, or other causes beyond its control. It is further understood and agreed that the failure of the producer of such series of motion pictures to make or deliver them or any of them, or of the Star above named to appear therein, or the failure of any prior Exhibitor to return any motion picture to the Distributor, in accordance with the agreement made between the latter and the Exhibitor, shall each be deemed to constitute a cause beyond the control of the Distributor, within the meaning of this agreement.

Fourth. The Exhibitor agrees to deliver to the local branch of the Distributor, if there be such, or to the nearest proper express company, or to the fastest messenger service (with the container properly addressed for re-shipment), the prints of the motion pictures hereinbefore mentioned, together with any appurtenances furnished to the Exhibitor by the Distributor for temporary use, immediately upon the termination of the period fixed in the notice to be given hereunder, for the exhibition of each of said films, respectively. The Exhibitor agrees that he will pay all delivery charges both ways. If the Exhibitor shall use or retain any motion picture, delivered hereunder beyond the period stated in said notice, without the written consent of the Distributor, or if any print of a motion picture delivered to the Exhibitor is run at any theatre other than the one enumerated herein, while in possession of the Exhibitor, the Exhibitor shall forthwith pay the Distributor for such use or retention, twice the pro rata amount as provided to be paid per day for such motion picture under this agreement, for each day of such use or retention, and shall in addition hold the Distributor harmless on account of any damage resulting from such use or retention.

Fifth. The Exhibitor agrees not to use any advertising matter in connection with said film, except that which is leased from the Distributor; to run the film as delivered without alteration, leaders or trailers; and to advertise and announce the production as presented by the Distributor and not otherwise.

Sixth. The Exhibitor agrees to return all motion picture films delivered by the Distributor in the same condition as they
168 are received, reasonable wear and tear excepted. The Exhibitor shall pay to the Distributor as liquidated damages the sum of eight cents for each lineal foot of film destroyed or injured in any way while the same is in the possession of the Exhibitor.

Seventh. Inasmuch as the Distributor is dependent for its ability to perform this contract, upon the production of the pictures above described, which may be prevented by the illness, injury, incapacity,

death or default of the Artists, Directors, and other persons or corporations, engaged in producing the same, and inasmuch as the performance of this agreement on the part of the Distributor may be prevented or delayed for various reasons beyond its control, it is recognized by both parties that it is necessary for the Distributor to reserve the right of cancelling this agreement. It is therefore specifically agreed that the Distributor may, upon ten days' notice to the Exhibitor, cancel this contract. In the event of such cancellation both parties shall thereafter be relieved of all further liability hereunder, except that the Exhibitor shall pay for all releases actually had and used, at the rates specified in this contract.

Eighth. This agreement shall not be valid until approved in writing on behalf of Famous Players-Lasky Corporation, by its President, Vice-President, either Managing Director, Treasurer, Assistant Treasurer, Secretary, Assistant Secretary, General Manager or District Manager; and no alteration hereof shall be valid except the same be in writing, and approved by one of the officers herein enumerated. The Exhibitor agrees not to assign this contract without the written consent of the Distributor.

Tax Clause: The Exhibitor Agrees That As Long As Section 906 Of The Revenue Act Of 1918 Shall Remain In Force, The Exhibitor Shall Pay To The Distributor In Addition To All Other Charges, A Sum Equal To Five (5) Per Cent, Of The Gross Film Rental, Or In The Event Of A Percentage Booking, A Sum Equal To Five (5) Per Cent Of The Distributor's Share, For All Pictures Delivered And/Or Exhibited Under This Contract On And After May 1, 1919, Such Five (5) Per Cent To Be Added To The Bill For Said Film And To Become Due When The Other Items On Said Bill Become Due, The Exhibitor Further Agrees That Any Default In The Payment Of Said Five (5) Per Cent Shall Be Considered A Default In The Same Way As The Non-Payment Of Any Other Moneys Due Under And Pursuant To This Contract.

Date, —, —, —. No. —.

A. D. B. D. S. D.

FAMOUS PLAYERS-LASKY
CORPORATION,

By — —,

By — —,

(Name of Exhibitor.)

By — —,

Exhibitor's Address, —,

By C. G. BINDERUP.

First Run Not Exclusive.

Form 2B—1918/19—500 Pads. 5-19.

Branch Office Copy.

EXHIBIT B ATTACHED TO PETITION.

Form No. 30.

Exhibitor's Copy.

Vitagraph Pictures.

Contract For Special Productions.

Agreement, made this 29 day of October, 1918, between Vitagraph-Lubin-Selig-Essanay, Inc., a corporation of the State of New York, with its central office at No. 1600 Broadway, New York, N. Y. (hereinafter called the Distributor), party of the first part; and C. G. Binderup, Stamford, Nebr. (Name and address of Exhibitor signing contract) ——— (hereinafter called the Exhibitor), party of the second part,

Witnesseth—The parties hereto, for and in consideration of One Dollar (\$1.00) by each to the other in hand paid, receipt whereof is hereby acknowledged, and the mutual covenants and agreements hereinafter contained, agree as follows:

170 First. The Distributor shall deliver and the Exhibitor shall accept at the office of the Distributor the following special motion picture productions controlled by the Distributor.

Second. The motion pictures so delivered may be used solely by the Exhibitor for exhibition and for no other purposes on days to be designated as provided herein at the following named theatres on the days of the week set opposite them respectively, to wit:

Production.	Starting date.	Exhibition days.	Price per booking.
Battle Cry of Peace.
Fall of a Nation.
God's Country and the Woman
Girl Philippa
Womanhood
Within the Law.
Over the Top.	Nov. 8th & 9th.	Friday & Sat.	\$86.00

Name of Theatre, Binderup; District —; Block —; Run —; 1st, —; 2nd, —; 3rd, —; 4th, —. Address, —. City, Stamford; State, Nebr.

Third. The exhibitor shall pay to the Distributor at the times and for the purposes hereinafter mentioned the following sums: On execution hereof as security for the performance of this agreement by the Exhibitor, and of all the obligations of the Exhibitor under any arrangement for rights for additional exhibition made between the parties hereto the sum of \$22.50 Dollars (\$22.50) to be applied to the payment of the special motion picture productions de-

liverable hereunder. Payment to be made one week in advance for the right to exhibit during the succeeding week such special motion picture productions for the number of days herein provided, otherwise such shipments will be forwarded C. O. D., in which event the Exhibitor agrees to lift same and to pay for all incidental charges.

Fourth. The Exhibitor shall deliver to the local branch office of the Distributor, if such there be, or shall ship by express to the Distributor at — or in accordance with instructions to be furnished by the Distributor, such special motion picture productions, together with appurtenances furnished to the Exhibitor for temporary use, immediately upon termination of the period herein fixed for exhibition thereof. The Exhibitor Shall Pay Any And All Delivery And Express Charges Covering Shipments Both Ways. If the Exhibitor fails to return any of such appurtenances as hereinabove provided, the Exhibitor shall pay the Distributor for such failure the cost price thereof to the Distributor.

Fifth. The terms and conditions printed on the reverse side of this contract are hereby acknowledged to be a part hereof and binding on the parties hereto.

In Witness Whereof, The Distributor has caused its corporate name to be subscribed hereto and the Exhibitor has set his hand and affixed his seal the day and year first above written.

VITAGRAPH-LUBIN-SELIG-ESSANAY, INC.,

By ———
Salesman.
C. B. BINDERUP,
Exhibitor.

[L. s.]

Countersigned:

———
Branch Manager.

Approved by the Company.

By J. LAWRENCE KENDRICK.

(On the reverse side of the foregoing contract appeared the following matter.)

Sixth. The Exhibitor agrees not to use any advertising matter in connection with said film, except that which is purchased from or approved by the Distributor; to run the film as delivered without alteration, leaders or trailers, nor shall any addition be made thereto; and to advertise and announce the production as presented by Vitagraph, and not otherwise.

The Distributor shall furnish and the Exhibitor shall purchase from the Distributor, posters, heralds, and other advertising matter for such special motion picture productions.

Seventh. The depositing for collection by the Distributor of the check tendered as security under this agreement shall not be deemed in any way as acceptance of the contract by the Distributor.

Eighth. Inasmuch as the Distributor is dependent for its ability to perform this contract upon the production of the pictures
172 above described, which may be prevented by the illness, injury, incapacity, death or default of the Artists, Directors, and other persons or corporations engaged in producing the same and inasmuch as the performance of this agreement on the part of the Distributor may be prevented or delayed for various reasons beyond its control, it is recognized by both parties that it is necessary for the Distributor to reserve the right of cancelling this agreement. It is therefore, specifically agreed that the Distributor may, upon ten days' notice to the Exhibitor, cancel this contract. In the event of such cancellation both parties shall thereafter be relieved of all further liability hereunder, except that the Exhibitor shall pay for all releases actually had and use, at the rates specified in this contract, and that the Distributor will repay to the Exhibitor any sums remaining to the credit of the latter.

Ninth. It is further understood and agreed that the failure of the producer of such motion picture to make or deliver them or any of them or of the Star named in this contract to appear therein or the failure of any prior exhibitor to return any motion picture to Distributor in accordance with the agreement made between the Distributor and the Exhibitors shall each be deemed to constitute a cause beyond the control of the Distributor within the meaning of this agreement.

Tenth. The Distributor may from time to time change the day or days of the week hereinabove specified for exhibition of special motion picture productions deliverable hereunder by giving notice of such change one week in advance thereof.

Eleventh. If the Exhibitor shall use or retain such special motion picture productions beyond the period stated in this contract without the written consent of the Distributor, or if any print of special motion picture productions delivered to the Exhibitor is run at any theatre other than the one enumerated herein, while in possession of the Exhibitor, the Exhibitor shall pay to the Distributor twice the pro rata amount provided to be paid per day under this agreement, for such use or retention, and shall in addition be fully liable for all damage resulting to the Distributor by reason of such unauthorized use, and shall further hold the Distributor harmless on account of any damage, liability, or suit on account of such unauthorized use.

Twelfth. The Exhibitor shall be responsible for the condition of each of said special motion picture productions and shall be fully liable for any damage to said special motion picture productions other than by reason of wear and tear due to the proper use
173 thereof. The Exhibitor shall pay to the Distributor on demand as liquidated damages the sum of fifteen cents (15c.) for each and every lineal foot of the entire motion picture or reel damaged or injured in any way while in the possession of the Exhibitor.

Thirteenth. That the Distributor shall not be liable for failure to make delivery hereunder by reason of censorship, accidents, railroad or express delays or any other cause beyond its control. In no event shall the Distributor be liable to damages in excess of the pro rata rental price of such film for such time as it could not be used.

Fourteenth. The Exhibitor shall not, if the Distributor objects, exhibit in this theatre or theatres any special motion picture productions while the actor who enacted the principal role in the production of said motion picture is performing in the city which said theatre or theatres are located, nor shall the Exhibitor announce such special motion picture productions for exhibition during the period such actor is scheduled to perform, and shall not pay for the days Exhibitor is so prevented from exhibiting such special motion picture productions.

Fifteenth. In the event of the failure of the Exhibitor to observe any of the terms and covenants of this agreement the Distributor may terminate the same without prejudice to moneys, damages or rights to which he may be entitled under this agreement.

Sixteenth. In the event of the failure of the Exhibitor to observe any of the terms and covenants of this agreement the Distributor shall not be required to make a tender of any of the above named special motion picture productions.

Seventeenth. The provisions hereof relating to the time of payment, and for exhibition of said special motion picture productions, shall be deemed as of the essence of this agreement.

Eighteenth. The Exhibitor shall not assign this contract or any rights hereunder without the written consent of the Distributor.

174 Nineteenth. This agreement shall not be binding on the Distributor until countersigned by one of the following Executive Officers, General Manager, Assistant General Manager,

Note. Manager Sales Promotion Department or Division Manager and no agent or solicitor of the Distributor shall have the power to vary the terms hereof.

Twentieth. The Exhibitor agrees further that so long as the United States War Revenue Act of October 3, 1917, shall remain in effect, the Exhibitor shall pay the Distributor, for all films received hereunder, the sum of fifteen cents (15c.) per reel, per day, because of war excise taxes imposed upon motion picture film.

Vitagraph Special Contract.

Branch ——. Contract No. —.

—, Exhibitor.

— Theatre.

—, Location.

District, —. Run, — 1st, —; 2nd, —; 3rd, —; 4th, —.

Special —. \$—.

(Vitagraph-Lubin-Selig-Essanay, New York—11 o'clock.)

(Order of District Court That Original Exhibits be Considered a Part of the Proceedings on the Writ of Error.)

In the District Court of the United States Within and for the District of Nebraska, Omaha Division.

No. 850. Law.

CHARLES G. BINDERUP, Plaintiff,

VS.

PATHE EXCHANGE, INC., et al., Defendants.

Order.

Ordered, that the Clerk of this Court forward to the Circuit Court of Appeals, Eighth Circuit, the following original Exhibits:

Exhibit A, attached to the petition, which is the Articles of Incorporation and by-laws of the Omaha Film Board of Trade;
175 also Exhibit —, A-Prime, B and C, which are samples of the printed form contracts entered into between Plaintiff and Defendants, to be considered a part of the proceedings on Writ of Error in said cause.

By the Court:

J. W. WOODROUGH,
Judge.

Endorsed: Filed Nov. 30, 1921. R. C. Hoyt, Clerk.

(Clerk's Certificate to Original Exhibits.)

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, R. C. Hoyt, Clerk of the District Court of the United States, within and for the District of Nebraska, hereby certify the foregoing to be the original Exhibits A, A-1, B and C, attached to the petition of the Plaintiff, and the Order of the Court, in Case No. 850 Law, as the same appears on file and of record in my office.

Witness My Hand, and the seal of said Court at Omaha, in said District, this 30th day of November, A. D. 1921.

[Seal U. S. Dist. Court, Dist. of Nebr., Omaha Div.]

R. C. HOYT,
Clerk.

(Endorsed:) Second Supplemental Transcript of record filed in U. S. Circuit Court of Appeals on Dec. 5, 1921.

(Stipulation of Counsel for Filing of Supplemental Transcript of Record, etc.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5907.

CHARLES G. BINDERUP, Plaintiff in Error,

VS.

PATHE EXCHANGE et al., Defendants in Error.

In Error to the District Court of the United States for the District of Nebraska.

It is hereby stipulated by and between counsel for Plaintiff in Error and counsel for Defendants in Error that the foregoing may be filed as a supplemental transcript of record in the above entitled cause and printed and added to the copies of the printed record, said printing to be done at the cost of the Plaintiff in Error.

NORRIS BROWN,

Counsel for Plaintiff in Error.

W. M. SEABURY,

Counsel for Defendant in Error.

(Endorsed:) Stipulation as to filing Second Supplemental Transcript of Record, etc., filed in U. S. Circuit Court of Appeals on Dec. 5, 1921.

And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Plaintiff in Error.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5907.

CHARLES G. BINDERUP, Plaintiff in Error,

VS.

PATHE EXCHANGE, INC., et al.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

NORRIS BROWN.

IRVIN F. BAXTER.

DANA B. VAN DUSEN.

G. P. ANDERBERY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 9, 1921.

(Appearance of Mr. Eugene N. Blazer as Counsel for Defendants in Error.)

The Clerk will enter my appearance as Counsel for the Defendants in Error.

EUGENE N. BLAZER

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 1, 1921.

(Appearance of Mr. William Marston Seabury as Counsel for Defendants in Error.)

The Clerk will enter my appearance as Counsel for the Defendants in Error.

WILLIAM MARSTON SEABURY,
120 Broadway, New York.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 2, 1921.

(Appearance of Mr. John J. Sullivan as Counsel for Defendants in Error.)

The Clerk will enter by appearance as Counsel for the Defendants in Error.

JOHN J. SULLIVAN.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 2, 1921.

178 *(Appearance of Mr. Arthur F. Mullen as Counsel for the Defendants in Error.)*

The Clerk will enter my appearance as Counsel for the Defendants in Error.

ARTHUR F. MULLEN,
1330 F. N. B. Bldg., Omaha, Nebr.

Nov. 2-21.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 4, 1921.

Notice of Motion to Dismiss Writ of Error.

United States Circuit Court of Appeals, Eighth Circuit.

No. 5907.

CHARLES J. BINDERUP, Plaintiff-in-Error,

vs.

PATHE E-CHANGE, INC., et al., Defendant-in-Error.

GENTLEMEN:

Please take notice that the annexed motion to dismiss will be presented to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri, on the 5th day of December, 1921, at the opening of court on that day, or as soon thereafter as counsel may be heard.

Yours, etc.,

JOHN J. SULLIVAN,

*Of Omaha,**Attorney for Defendants.*

ARTHUR F. MULLEN,

*Of Omaha,**Attorney for Defendants A. H. Blank,
A. H. Blank Enterprises. and C. Earl Holah.*

EUGENE M. BLAZER,

*Of Omaha,**Attorney for Defendant Omaha Film Board of Trade.*

To Messrs. Brown, Baxter & Van Dusen, C. P. Anderbery, Esq.

179 *Motion to Dismiss Writ of Error for Want of Jurisdiction.*

United States Circuit Court of Appeals, Eighth Circuit.

No. 5907.

CHARLES J. BINDERUP, Plaintiff-in-Error,

vs.

PATHE EXCHANGE, INC., et al., Defendant-in-Error.

Comes now the defendants-in-error and on the record herein as amended in the District Court on about November 5th, 1921, and upon the opinion of the Court below, severally move the Court to dismiss the writ of error sued out by the plaintiff-in-error to review a judgment in the above entitled cause entered in the District Court of the United States for the District of Nebraska, Omaha Division,

on April 20th, 1921, upon the ground that this Court has no jurisdiction to review said judgment for the reason that the suit is one cognizable only in a Federal Court in which the jurisdiction of the District Court was asserted and invoked by the plaintiff solely on the ground that the suit was one which arose under the laws of the United States, namely, under the Act of July 2, 1890, commonly known as the Sherman Act, and the acts amendatory thereof, in which suit no other ground of Federal jurisdiction existed or was asserted wherein the sole question presented to and determined by the District Court involved an inquiry into that Court's jurisdiction as a Federal Court and resulted in the single determination and decision that the District Court as a Federal Court had no jurisdiction to hear and determine the controversy described in the petition, appellate jurisdiction to review such judgment being vested by Sections 128 and 238 of the Federal Judicial Code, exclusively in the Supreme Court of the United States. And the defendants and each of them will further move the Court at said time and place for such other and further relief in the premises as to the Court may seem proper.

JOHN J. SULLIVAN,

Of Omaha.

Attorney for Defendants.

ARTHUR F. MULLEN,

Of Omaha.

*Attorney for Defendants A. H. Blank,
A. H. Blank Enterprises, and C. Earl Holah.*

EUGENE M. BLAZER,

Of Omaha.

Attorney for Defendant Omaha Film Board of Trade.

180 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov.
25, 1921.

(Acknowledgment of Service of Notice and Motion to Dismiss.)

I hereby acknowledge service in the above entitled cause of Notice, Motion to Dismiss and Brief of the Defendants in Error in Support of Motion to Dismiss. Verbal notice of intention to file said motion was given ten days prior to this date.

Dated Nov. 21, 1921.

CHARLES J. BINDERUP,
By BROWN, BAXTER & VAN DUSEN,
His Attorneys.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 30,
1921.

(Order of Submission of Motion to Dismiss.)

December Term, 1921.

Monday, December 5, 1921.

This cause came on this day for hearing upon the motion of defendants in error to dismiss and was argued by counsel, Mr. W. M. Seabury appearing for defendants in error in support of the motion and Mr. Norris Brown for the plaintiff in error in opposition thereto.

Thereupon the motion was by the Court taken under advisement, together with the briefs filed in support of as well as in opposition thereto.

(Order Denying Motion to Dismiss Writ of Error.)

December Term, 1921.

Tuesday, December 6, 1921.

This cause came on to be heard on the motion of the defendants in error to dismiss the writ of error and the same was argued by counsel.

After due consideration of said motion and the briefs of counsel, in support as well as in opposition thereto. It is now here ordered by this Court that the said motion to dismiss the writ of error be, and the same is hereby, denied.

December 6, 1921.

181

(Order of Argument.)

December Term, 1921.

Tuesday, January 17, 1922.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Dana B. Van Dusen for plaintiff in error, continued by Mr. W. M. Seabury for defendants in error and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

(Order of Submission.)

December Term, 1921.

Wednesday, January 18 1922.

This cause having been called for further hearing, argument was resumed by W. M. Seabury for defendants in error and concluded by Mr. Dana B. Van Dusen for plaintiff in error.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

(*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1921.

No. 5907.

CHARLES G. BINDERUP, Plaintiff in Error,

VS.

PATHE EXCHANGE, INC., et al., Defendants in Error.

In Error to the District Court of the United States for the District of Nebraska.

Mr. Dana B. Van Dusen (Mr. C. P. Anderbery, Mr. Norris Brown and Mr. Irving F. Baxter on the brief with him), for plaintiff in error.

Mr. William Martson Seabury (Mr. John J. Sullivan, Mr. Arthur F. Mullen and Mr. E. N. Blazer on the brief with him), for defendants in error.

Before Sanborn and Carland, Circuit Judges, and Trieber, District Judge.

182 Trieber, District Judge, delivered the opinion of the Court. The parties will be referred to herein as they appeared in the court below, the plaintiff in error as plaintiff and the defendants in error as defendants.

The action is to recover three-fold damages in the amount of \$240,054.00, under the Sherman Anti-Trust Act, the jurisdiction of the court being invoked solely upon the ground that the injury complained of is for a violation of that Act of Congress, there being no diversity of citizenship. Neither the jurisdiction of the court, nor the sufficiency of the complaint was questioned by the defendants by demurrer or any other motion, but defendants filed their answers and went to trial on the issues made by the pleadings. The trial was to a jury.

After counsel for the plaintiff had made his opening statement to the jury, the defendants moved for a directed verdict on the petition and opening statement of counsel. By leave of the court plaintiff amended some of the paragraphs of his petition, and thereupon the motion for a directed verdict, was by the court sustained. To reverse this judgment, entered on the directed verdict of the jury, this writ of error is prosecuted. The court, as stated in a memorandum opinion, sustained the motion for a directed verdict upon two grounds. First, that "the petition, as amended, does not show with sufficient clearness that the court has jurisdiction" and second that "it fails to show with sufficient clearness or certainty any

combination or conspiracy for an illegal purpose or any combining together in concert to use illegal means, sufficient to justify the court in proceeding further in the trial of the case.

As the jurisdiction of the court in one of the grounds upon which the court directed a verdict, it must be disposed of first, as, if sustained, the court will be without jurisdiction to rule on the other contentions of the defendant, that the allegation of the complaint fail to state a cause of action, entitling plaintiff to recover a judgment against them, or the second ground which the court below stated for directing the verdict.

The complaint, after having been amended, charges the defendant to have conspired to ruin his motion picture business and succeeded in their purpose by refusing to supply him with picture films. It alleges that he was the owner and operator of several motion picture theatres in different cities in the State of Nebraska, and also in the

business of selecting and distributing to a circuit of moving picture theatres, commonly known as "The Binderup Circuit," programs of moving picture films and advertising matter accompanying the same, through an agreement entered into between himself and the parties operating said moving picture theatres, in twenty cities named, all in the State of Nebraska; that the defendants, during the year 1915 and ever since then, and for several years prior were engaged in the moving picture business, either as producers and manufacturers of moving picture films, or as distributors thereof, or both; that the manufacturers made them in states other than the State of Nebraska, and when completed they were perfected and approved by them in the City of New York, and then they would publicly announce, by an extensive system of advertising, that the picture would be sent out from New York to their various branch offices in the various states of the United States and particularly, Omaha, Nebraska, and by their Omaha branch distributed to their patrons in the States of Nebraska, Iowa and South Dakota; that the defendants controlled the distribution of the entire production of films in the United States and they cannot be procured from others; that the defendant Omaha Film Board of Trade is a Nebraska Corporation. Its articles of incorporation, made a part of the complaint shows that it is organized for the purpose of promoting good will among those engaged in the film and picture business, to adjust controversies among themselves; that it shall be composed of persons or corporations engaged in the film industry, particularly distributors.

The membership is dependent upon the conditions that:

1. Continues to be affiliated with the corporation.
2. Is connected with some branch of the film and motion picture business, maintaining an office in Omaha.
3. Is the manager or the executive head of the firm of the branch of the firm he represents.
4. Abides by the terms of the articles of incorporation and by-laws.

It then provides for the limit of membership, the dues and officers of the corporation.

The by-laws so far as material to this case, after providing for the time of meetings, election and duties of the directors and officers, provide that membership shall be limited to one representative from any company or individual engaged in the film business, maintaining an office in Omaha, and continues as long as he abides by 184 and performs the terms provided by the by-laws; that membership is a valuable concession and personal privilege, not assignable without the consent of the corporation. The corporation shall have full power and determine all matters relative to and arising out of violations of the by-laws and impose punishment therefor. That in order to defend members against imposition, wrongful failure to C. O. D. shipments of films, a clearing house may be established for protective information, which shall be furnished to members free of charge and members shall report such acts to the Secretary; whereupon the Secretary shall write to the party committing said acts for an explanation. By vote of a two-thirds majority a member may be expelled after notice and a trial. The Board of Directors may offer its services to induce settlements of disputes between parties in the business, or affecting trade and commerce.

It is further alleged that the defendant Graham was the branch manager at Omaha of the defendant Pathe Exchange, Inc., of New York and Nebraska, and also the presiding officer of the board of directors of the defendant Omaha Film Board of Trade. It then sets out the names of the branch managers at Omaha of the other defendant producers. That in carrying on his business it was necessary for plaintiff to procure films through the Omaha branch offices at Omaha, Nebraska, and at times it became, in order to supply the demands of plaintiff, for the defendants to procure films outside of the State of Nebraska. That owing to his successful and profitable business the cupidity of the defendants was aroused, whereupon some of the defendants, which are named, requested him to give them a share of his patronage, and upon his refusal, threatened to put him out of business by starting an Exchange at Holdrege, Nebraska, and supply by underbidding, all of the theatres of which his circuit was composed. That in April, 1919, the defendants for the purpose of enabling them to control prices and dictate terms upon which they could transact business with their patrons operating theatres in the States of Nebraska, Iowa and South Dakota, caused the said Omaha Film Board of Trade to be organized; that in leasing their films from the New York offices through the branch offices in Omaha they entered into written and oral contracts with the plaintiff, in accordance with the terms and conditions set out in the articles of incorporation and by-laws of the Omaha Film Board of Trade; that the title, control and right to recall said films at all times was retained by the home offices in New York of the defendants. The plaintiff's business in the early part of 1919 had grown to large proportions and prior to September, 1919, was procuring pictures 185 from some of the defendant film producers, who were members of the

Omaha Film Board of Trade and because he refused to buy from other members a spirit of hostility was aroused on their part against him, and they brought great pressure on the others, with whom he was dealing to cease doing business with him. That thereupon all the defendants unlawfully combined in restraint of trade among the several states with the intent of preventing him from continuing his said business and for the purpose of monopolizing the business of distribution, and lease or sale within said territory of picture film programs, and eliminating the competition of plaintiff within said territory. To carry the conspiracy into effect defendants caused false charges to be made against him before said Board of Trade and without notice he was placed in the black or blue list of said Board of Trade, whereupon each of the defendants, at once ceased and refused to transact any business with him, and ever since have refused to do so, by reason whereof his business has been ruined. That they sent notices thereof to the various moving picture theatres, comprising the Binderup Circuit that on and after September 15, 1919, they would have to order their programs and service from the Omaha Exchanges, as they would discontinue supplying the Binderup Circuit with any programs, films, advertising matter or service. That on September 1, 1919, he was removed from the so-called black or blue list, whereupon representatives, with whom he had no business dealings before, solicited his business, which he declined; that on November 10, 1919, defendants caused further charges to be made against him by members of said Board of Trade, and he was again placed on the black or blue list without notice or hearing. That he was denied service, as he was told, until his name was removed from the black or blue list; that a meeting of the Grievance Committee was had at which a resolution was adopted that "he be kept on the black or blue list indefinitely and that he be not supplied with any service whatsoever, for bookings for any house that does not actually and wholly belong to him outright, and none for these unless he deposit \$1,000.00 subject to forfeit, if he violates any of the rules of the association." That he refused to do so and ever since the defendants have refused to have any dealings with him, cancelling unexpired contracts he had with them. That by reason of these acts he has suffered damages in the sum of \$240,051.00 and prays judgment for treble that sum.

186 As there is no diversity of citizenship, the jurisdiction of the court could only be maintained under the Sherman Anti-Trust Act, if the acts complained of, involved interstate commerce. From the allegations in the complaint it is apparent that no shipments of programs, films or advertising matter are ever made from the City of New York, to the motion picture theatres, but they are shipped to their respective branch offices in Omaha, Nebraska, and by them leased and furnished to the plaintiff or other theatres from their store houses in Omaha. That being the fact, they had reached their destination in the movement from New York and had come at rest in Omaha, and thereupon they ceased to be in interstate commerce, unless shipped from Omaha to another state, when they

would again be in interstate transportation, but independently of the former shipment from New York. *American Steel & Wire Co. vs. Speed*, 192 U. S. 500, 521; *General Oil Co. vs. Crain*, 209 U. S. 211, 230; *Banker Bros. vs. Pennsylvania*, 222 U. S. 210; *Bacon vs. Illinois*, 227 U. S. 505; *Public Utilities Com. vs. Landon*, 249 U. S. 236, 245; *Southern Pacific vs. Arizona*, 249 U. S. 472, 477. In the *General Oil Co.* case the court said: "It (the oil) had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in *State &c. vs. Engle*, supra, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property given in a locality in the State beyond a mere halting in its transportation. It required storage there, the maintenance of the means of storage, of putting it in and taking it from storage." In *Baker Bros. vs. Pennsylvania* the right of the state to tax defendants on sales of automobiles made in Pittsburgh, Pa., was in issue. The facts were that the defendants kept no machines in stock, but would obtain them from a manufacturer in another state. A purchaser would order the machine from the defendants in Pennsylvania; the order being addressed to the defendants, the manufacturer's name (the *Pierce Company*) not appearing on the order. The defendants would forward the order to the *Pierce Company*, who would ship it to the defendants, at Pittsburgh, Pa., with draft on defendants attached to the bill of lading, less the commission. On paying the draft, the *Banker Bros.* would take up the bill of lading, receive the car from the carrier and then deliver it to the buyer on his paying the balance of the purchase money. It was held that the *Banker Bros.* had the title and the shipment had become at rest in the State of Pennsylvania, though shipped in interstate commerce, and
187 therefore subject to the tax imposed by the state.

In *Bacon vs. Illinois*, it was held: "Property brought from another state and withdrawn from the carrier and held by the owner with full power of disposition becomes subject to the local taxing power notwithstanding the owner may intend to ultimately forward it to a destination beyond the State."

In *Southern Pacific vs. Arizona*, it was claimed that "the proposed movement of the shows was 'inter-state in character' because they were engaged in a tour, beginning at the City of El Paso, Texas, and designed to extend through the States of Arizona and New Mexico and into the State of California, of which tour the movement from Tucson, Arizona, to Phoenix, Arizona, was a part." In denying this contention the court said: "At that time the shows were in the exclusive possession and control of the owner, exhibiting for six days at Tucson and the application to the *Southern Pacific Company*, which was refused, shows incontrovertibly, that the transportation to Tucson had terminated, and that no other transportation had then been contracted for. * * * The mere intention of the shipper to ultimately continue his tour beyond the State of Arizona did not convert the contemplated intrastate movement into one that was interstate."

In *Public Utilities Com. vs. Landon*, the Kansas Natural Gas Company, owned a system of pipe lines extending from Oklahoma, to Kansas, and transported and sold natural gas to local companies in Kansas for ultimate sale by them to their customers, accepting therefor a definite proportion of the gross amount paid by the customers to the local companies. Permanent physical connections permitted gas to pass from the Natural Gas Company's pipe lines into the mains of the local companies. The questions involved was whether the gas supplied by the local companies, after having been received from the Natural Gas Company, which transported it from Oklahoma, was interstate commerce. The court held it was not. In the opinion it said:

"That the transportation of gas through pipe lines from one State to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the State. *American Express Co. vs. Iowa*, 196 U. S. 133, 143; *Oklahoma vs. Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell vs. Kansas Natural Gas Co.*, 224 U. S. 217.

188 "But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burnertips by the local companies operating under special franchises constituted any part of interstate commerce. The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. Payment to the receivers of sums amounting to two-thirds of the product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage by agent or otherwise in the retail transactions carried on by the local companies. Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods. *Rearick vs. Pennsylvania*, 203 U. S. 507, 512; *The Pipe Line Cases*, 234 U. S. 548, 560. The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains. The court below erroneously adopted the contrary view and upon it rested the conclusion that the Public Commissions were interfering with establishment of compensatory rates by the receivers in violation of their rights under the Fourteenth Amendment."

Counsel for plaintiff relies upon cases like *Caldwell vs. North Carolina*, 187 U. S. 622; *Rearick vs. Pennsylvania*, 203 U. S. 507; *Crenshaw vs. Arkansas*, 227 U. S. 389, and cases like these. But they are clearly inapplicable. In those cases orders were taken for goods to be shipped from other states. They were shipped to the agent of the vendor, who delivered them to the parties, who had given him

the orders. The goods were never placed in stock, but delivered as they arrived.

There is no allegation in the complaint of the case at bar that his orders for films were sent from New York or any other state and shipped to the Omaha branch for delivery to him. On the contrary the allegations are that after receipt of them by the managers of the Omaha branch, plaintiff would lease them from the manager. *Wagner vs. City of Covington*, 251 U. S. 95, is conclusive as to the inapplicability of these cases to a state of facts, as alleged by plaintiff in his complaint.

In our opinion the complaint fails to show that the transactions complained of were in interstate commerce, and for this reason the court properly directed a verdict. As to the other ground which the court mentioned, for directing the verdict, we need not pass on it, nor would it be proper to do so, as the court was without jurisdiction.

The judgment is affirmed.

Filed March 28, 1922.

SANBORN, *Circuit Judge*, dissenting:

The question in this case is, do the facts alleged in the complaint show that the business conducted by the plaintiff, the contracts made and transactions had by him with the defendants or any of them, which he alleges they conspired to suppress, and did suppress, constitute interstate commerce.

The complaint contains averments of these facts: Certain defendant corporations of the State of New York named in the complaint, which either manufactured, owned, or distributed from their places of business in New York City, moving pictures films, which they had there completed or approved, and who, for convenience, will be termed producers, after perfection and approval of these films, were accustomed publicly to announce from time to time by advertisements that these films would be released, which meant that they would be sent out from New York by express or parcel post to branches or agents which they had in various cities, one of which was in Omaha, Nebraska, to be delivered by the agents, to those who hired and paid for the use thereof by displaying them in the theatres in the vicinities of these respective branches or agents. The plaintiff was the owner of one theatre, the operator of two or three others, and for the operators of several other theatres he selected, secured and distributed to them the use of picture films which producers leased for this purpose. The defendant producers leased the use of their films for exhibition by the plaintiff and by the operators in Nebraska and vicinity for whom he selected such films from their New York offices, through their branch office or agents in Omaha. The producers accomplished this by entering into written and oral contracts with the plaintiff substantially on the terms and conditions set forth in exhibits "A," "B," and "C" attached to the complaint. By the terms of these contracts the producers retained the title, the control and the right to recall these films at their home

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190 offices in New York. The nature of these contracts and the character of the commerce transacted under them appears from exhibit "A" which was a contract between the defendant, the Goldwyn Corporation of New York, a producer, styled in the agreement the "Exchange" and the plaintiff Binderup, lessee of the moving picture films described therein, who was called in the contract "Exhibitor." By this agreement the "Exchange" agreed to furnish the "Exhibitor" at the former's branch office in Omaha, one print of each of twenty-six photoplays, beginning with the motion picture released September 9, 1917, to let to the exhibitor the right and license publicly to exhibit and display each of said prints in the Opera House Theatre, in the City of Franklin, Nebraska, and at no other place, and that the exhibitor should have the right to the first run of each of said prints in Franklin, Nebraska. The exhibitor agreed to accept and publicly exhibit for two consecutive days the first of the prints on September 27, 1918; and each successive print every second Friday thereafter for a like number of days; that he would pay the exchange for the use of and the right to exhibit each of said prints for the number of days specified \$10.00; that he would deliver back to the exchange and pay the cost thereof at its branch office, if in the same city in which the exhibitor's theatre was located, or if the exchange maintains no office in said city (and it probably did not in Franklin) to the office of the express company or other carrier designated by the exchange, or if an express carrier or other carrier is not so designated, to the nearest proper express company, or to the most rapid carrier service, immediately after the close of the performance upon the last day of exhibition of the respective prints, each of the prints in the metal can and shipping case furnished therewith correctly and legibly addressed for reshipment in accordance with direction and advices previously given or to be given by the exchange, and that he would pay all expenses or other carriage charges incurred in shipping the films to the exhibitor. This contract contained also agreements that it should not be binding upon the Exchange unless countersigned and approved on its behalf by one of its officers in the City of New York, and that it and every term and condition thereof should be deemed an agreement made, executed and delivered in the State of New York, and that they should be construed according to the laws and statutes of that State. The sample contracts exhibit "B" and "C" attached to the petition differed from Exhibit "A" in the names of the producers the moving pictures films described and other such details, but they contained substantially the same provisions that have been recited from Exhibit "A". There are other averments in the complaint which point in the same direction as those which have been recited.

The averments recited, however, have convinced me that these contracts, the shipments of the films from New York to Nebraska for the plaintiff pursuant thereto, the delivery thereof to the plaintiff by the agents or branches of the producers in Omaha for his use in accordance with the terms of the contract, all constituted parts of Interstate Commerce between the plaintiff and the New York pro-

ducers, which, according to the averments of the plaintiff, their alleged unlawful acts first unreasonably restrained and then suppressed.

If the producers had agreed with the plaintiff to sell these films to him and to ship them to their branches or agents in Omaha, and there to deliver them to him upon his call and if they had performed that contract, there could be no doubt that the transactions between the producers and the plaintiff constituted interstate commerce.

It seems to me that contracts to lease the use of films, to ship the films from New York to Nebraska and deliver them upon the call of the lessee at the branches or offices of the agents of the producers in the same way and the performance of such contracts, must also constitute such commerce.

The averments of this complaint are in effect that the entire business and all the transactions between the defendant producers and the plaintiff were founded upon these contracts between the producers, corporations of the State of New York, whose officers in New York executed and approved them, and the plaintiff, a citizen and resident of the State of Nebraska. These contracts provided that they should be construed by the laws and statutes of New York that the producers would lease to the plaintiff, a Nebraska operator, for temporary display, and would ship from New York to him to be delivered to him at Omaha by their branches or agents on his call, these moving picture films, which he agreed to display in theatres in the vicinity of Omaha, and immediately thereafter to return them to the producers. In my opinion these agreements were contracts to engage in interstate commerce. Their performance was interstate commerce. The alleged conspiracy of the defendants to suppress that commerce and its suppression constituted a violation of the Anti-

Trust Act of Congress. The court below therefore had jurisdiction of the issues presented by the averments of the complaint and the denials of the answers in this case. *United States vs. Motion Picture Patents Company*, 225 Fed. 800; *United States vs. United States Shoe Machinery Co.*, 234 Fed. 127, 143, 144; *Butler Bros. Shoe Co. vs. United States Rubber Co.*, 156 Fed. 1, 17; *Swift & Company vs. United States*, 196 U. S. 375, 396, 397; *Loewe vs. Lawler*, 208 U. S. 274, 300, 302; *Dahnke-Walker Milling Co. vs. Banderiaux*, Supreme Court, December 12, 1921; *Lempke, Attorney General vs. Farmers Grain Company*, Supreme Court, February 27, 1922.

And it seems to me that the judgment of the court below ought to be reversed and this case ought to be remanded to that court for a new trial.

Filed March 28, 1922.

(Judgment.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1921, Tuesday, March 28, 1922.

No. 5907.

CHARLES G. BINDERUP, Plaintiff in Error,

VS.

PATHE EXCHANGE, INC., PATHE EXCHANGE, INC., OF NEBRASKA, Exhibitors Mutual Distributing Corporation, Famous Player-Lasky Corporation, Fox Films Corporation, Select Pictures Corporation, Goldwyn Pictures Corporation, First National Exhibitors Circuit, Inc., A. H. Blank, A. H. Blank Enterprises, Vitagraph-Lubin, Selig-Essanay, Inc., W. W. Hodkinson Corporation, Metro Pictures Corporation, Universal Film Exchanges, Incorporated, Enterprise Distributing Corporation, Fontenelle Feature Film Company, Incorporated, Globe Film Company, Hall Mark Pictures Corporation, Omaha Film Board of Trade, Harry D. Graham, Sidney Meyer, William F. Coleman, Charles W. Taylor, James H. Calvert, Eugene N. Blazer, Samuel A. McIntyre, Edmund J. MacIvor, Charles L. Peavey, C. Earl Holah, Max Wintraub, Maude E. Larson, Thomas E. De Laney, Herbert K. Moss, Robertson-Sole Distributing Corporation and Harry F. Lefholz.

In Error to the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

193 On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Pathe Exchange, Inc., and others named as appellees in the citation on appeal to this Court, have and recover against Charles G. Binderup the sum of twenty dollars for their costs herein and have execution therefor.

March 28, 1922.

(Petition for Writ of Error from Supreme Court U. S. and Allowance Thereof, etc.)

Considering himself aggrieved by the final decision of the United States Circuit Court of Appeals for the Eighth Circuit, in rendering judgment against him in the above-entitled case, the plaintiff hereby prays a writ of error from the said decision and judgment to the

Supreme Court of the United States, and an order fixing the amount of a supersedeas bond.

Assignment of error herewith.

CHARLES G. BINDERUP,
Plaintiff in Error,

By DANA B. VAN DUSEN.

UNITED STATES OF AMERICA, *ss:*

United States Circuit Court of Appeals for the Eighth Circuit.

Let the writ of error issue upon the execution of a bond by Charles G. Binderup to the defendants in error in the sum of \$500; such bond when approved to act as a supersedeas.

Dated June 6, 1922.

WALTER H. SANBORN,
*Justice United States Circuit Court of
Appeals for the Eighth Circuit.*

194 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun.
6, 1922.

(Assignment of Errors on Writ of Error from Supreme Court U. S.)

Now comes the above Charles G. Binderup, plaintiff in error, and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above-entitled action, and for the purpose of having the same reviewed in and by the Supreme Court of the United States, makes the following assignment:

The United States Circuit Court of Appeals for the Eighth Circuit erred in holding and deciding that the facts alleged in plaintiff's complaint fail to show that the transactions complained of were in interstate commerce and that the acts complained of therefore did not constitute a violation of the act of Congress known as the Sherman Anti-Trust Act, and that, therefore, the Federal Courts are without jurisdiction in the premises; the said Court further erred in not finding that said acts complained of were in interstate commerce and that the District Court of the United States for the District of Nebraska, and the Circuit Court of Appeals for the Eighth Circuit had jurisdiction in the premises, and in failing to further find that the complaint stated facts sufficient to constitute an illegal combination or conspiracy under the said Sherman Anti-Trust Act.

Wherefore, the plaintiff in error, Charles G. Binderup, prays that the said judgment of the United States Circuit Court of Appeals for the Eighth Circuit be reversed, that the complaint be found to involve transactions in interstate commerce and to state facts sufficient to constitute a violation of the Sherman Anti-Trust Act, and
195 that the case be remanded to the District Court of the United States for the District of Nebraska for trial, and that plaintiff in error be adjudged his costs in the District Court of the United States for the District of Nebraska and in the United States Circuit

Court of Appeals for the Eighth Circuit and in this court against defendants in error.

CHARLES G. BINDERUP,
Plaintiff in Error,
By DANA B. VAN DUSEN,
NORRIS BROWN,
IRVING F. BAXTER,
His Counsel.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 6, 1922.

196 In the Supreme Court of the United States, — Term, 1922.

No. —.

CHARLES G. BINDERUP, Plaintiff in Error,

vs.

PATHE EXCHANGE, INC., et al., Defendants in Error.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals for the Eighth Circuit, before you, or some of you, at the December term, A. D. 1921, thereof, between Charles G. Binderup, plaintiff in error, and Pathe Exchange, Incorporated, et al., defendants in error, a manifest error hath happened, to the great damage of the said Charles G. Binderup, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the Supreme Court at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 6th day of June, in the Year of Our Lord One Thousand Nine Hundred Twenty-two.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of U. S. Circuit Court of
Appeals, Eighth Circuit.

Allowed: June 6, 1922.

WALTER H. SANBORN,
Judge of U. S. Cir. Ct. of
Appeals for Eighth Circuit.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this first day of July, A. D. 1922.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of U. S. Circuit Court of
Appeals, Eighth Circuit.

[Endorsed:] No. 5907. Charles G. Binderup, Plaintiff in Error, vs. Pathe Exchange, Inc., et al. Writ of Error from Supreme Court, U. S., and Clerk's Return. Filed Jun- 6, 1922. E. E. Koch, Clerk

197 (*Bond on Writ of Error from Supreme Court U. S.*)

In the United States Circuit Court of Appeals for the Eighth Circuit.

General No. 5907.

CHARLES G. BINDERUP, Plaintiff in Error,

vs.

PATHE EXCHANGE, INC., et al., Defendants in Error.

Know all men by these presents:

That Charles G. Binderup, a resident of the State of Nebraska, as principal, and United States Fidelity and Guaranty Company, of Baltimore, Md., a corporation organized under and existing by virtue

of the laws of the State of New Jersey, and maintaining an agency and doing business in the City of Minden, State of Nebraska, as surety, are held and firmly bound unto Pathe Exchange, Inc., Pathe Exchange, Inc., of Nebraska, Exhibitors Mutual Distributing Corporation, Famous Players-Lasky Corporation, Fox Film Corporation, Select Pictures Corporation, Goldwyn Pictures Corporation, First National Exhibitors Circuit, Inc. A. H. Blank, A. H. Blank Enterprises, Vitagraph-Lublin-Selig-Essanay, Inc. W. W. Hodkinson Corporation, Metro Pictures Corporation, Universal Film Exchanges, Incorporated, Laemmle Film Service, Enterprise Distributing Corporation, Fontenelle Feature Film Company, Incorporated, *Globe* Film Company, Hall Mark Pictures Corporation, Omaha Film Board of Trade, Harry D. Graham, Sidney Meyer, William F. Coleman, Charles W. Taylor, James H. Calvert, Eugene N. Blazer, Samuel A. McIntyre, Edmund J. MacIvor, Charles L. Peavey, C. Earl Holah, Max Wintroub, Elmer J. Tilton, Maude E. Larson, Thomas E. De Laney, John J. Milstein, Herbert K. Moss, Robertson-Cole Distributing Corporation and Harry F. Lefholz, Carl E. Laemmle, in the sum of Five Hundred Dollars, well and truly to be paid to the parties just named or such of them as the court may designate, in such proportion or amounts as the court may at the proper time and in the proper manner designate, their successors and assigns, to the payment of which well and truly to be made, we bind ourselves and our assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated the 6th day of June, in the year 1922.

Whereas, the above-named Charles G. Binderup, of Minden, Nebraska, plaintiff in error, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the United States Circuit Court of Appeals for the Eighth Circuit in the above-entitled action.

Now, therefore, the conditions of this obligation are such that if the said Charles G. Binderup shall prosecute his writ of error to effect, and answer all damages and costs adjudged and entered of record, if he fail to make his plea good, then the above obligation to be void, otherwise to remain in full force and effect.

CHARLES G. BINDERUP, *Principal*.
UNITED STATES FIDELITY AND
GUARANTY COMPANY OF BAL-
TIMORE, MARYLAND, *Surety*,

[SEAL.]

By C. P. ANDERBERY,
Its Agent and Attorney in Fact, Surety.

Witness to both signatures.
LOREN CHRISTENSEN.

Approved June 9, 1922.
WALTER H. SANBORN, *Circuit Judge.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 9, 1922.

No. —.

CHARLES G. BINDERUP, Plaintiff in Error,

VS.

PATHE EXCHANGE, INC., et al., Defendants in Error.

Citation.

THE UNITED STATES OF AMERICA, ss:

The President of the United States to Pathe Exchange, Inc., Pathe Exchange, Inc. of Nebraska, Exhibitors Mutual Distributing Corporation, Famous Players-Lasky Corporation, Fox Film Corporation, Select Pictures Corporation, Goldwyn Pictures Corporation, First National Exhibitors' Circuit, Inc. A. — H. Blank, A. H. Blank Enterprises, Vitagraph-Lubin-Selig-Essanay, Inc., W. W. Hodkinson Corporation Metro Pictures Corporation, Universal Film Exchanges Incorporated, Laemmle Film Service, Enterprise Distributing Corporation, Fontenelle Feature Film Company, Incorporated, Glove Film Company, Hall Mark Pictures Corporation, Omaha Film Board of Trade, Harry D. Graham, Sidney Meyer, William F. Coleman, Charles W. Taylor, James H. Calvert, Eugene N. Blazer, Samuel A. McIntyre, Edmund J. MacIvor, Charles L. Peavey, C. Earl Holah, Max Wintroub, Elmer J. Tilton, Maude E. Larson, Thomas E. Delaney, John J. Milstein, Herbert K. Moss, Robertson-Cole Distributing Corporation and Harry F. Lefholz, Carl E. Laemmle, and to John L. Sullivan, Esq., of Omaha, Nebraska, Counsel for Corporate Defendants; Eugene N. Blazer, Esq., of Omaha, Nebraska, Counsel for the Individual Defendants and the Omaha Film Board of Trade; Arthur F. Mullen, Esq., of Omaha, Nebraska, Counsel for Defendants A. H. Blank and C. E. Holah; William Marston Seabury, Esq., of New York City, Counsel for all of the Defendants in Error, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Charles G. Binderup, of Minden, Nebraska, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Judge of the United States Circuit Court of Appeals for the Eighth Circuit this
200 6th day of June, 1922.

WALTER H. SANBORN,
*Judge of the United States Circuit Court of
Appeals for the Eighth Circuit.*

Attest:

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk United States Circuit Court of
Appeals for the Eighth Circuit.*

Acknowledgment of Service.

New York, N. Y., — —, 1922.

I, William Marston Seabury, counsel of record for all of the defendants in error in the above-entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

Counsel for All of the Defendants in Error.

Omaha, Nebr., — —, 1922.

I, John J. Sullivan, counsel of record for the corporate defendants in error in the above-entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

Counsel for Corporate Defendants in Error.

Omaha, Nebraska, June 19, 1922.

I, Eugene N. Blazer, counsel of record for the individual defendants in error and the Omaha Film Board of Trade, in the above-entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

EUGENE N. BLAZER,
*Counsel for Individual Defendants in Error and
the Omaha Film Board of Trade.*

201 Omaha, Nebraska, June 19, 1922.

I, Arthur F. Mullen, counsel of record for defendants in error A. H. Blank and C. E. Holah, in the above-entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

ARTHUR F. MULLEN,
*Counsel for Defendants in Error A. H. Blank and
C. E. Holah, and All of the Corporate Defendants.*

202 In the United States Circuit Court of Appeals for the Eighth Circuit.

CHARLES G. BINDERUP, Plaintiff in Error,

VS.

PATHE EXCHANGE, INC., et al., Defendants in Error.

Affidavit of Service.

STATE OF NEBRASKA,
County of Douglas, ss:

Dana B. Van Dusen, being first duly sworn, on oath deposes and says that he is one of the counsel for Charles G. Binderup, plaintiff in error, in this cause, and that he personally served upon John J. Sullivan, Esq., counsel for the corporate defendants, at his residence in the City of Omaha, Nebraska, on the 21st day of June, 1922, the original copy of the citation signed by Walter H. Sanborn, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, in the above-entitled cause, and that at the same time he presented and served the original præcipe designating the portions of the record to be printed in the return to the writ in this cause; that said John J. Sullivan thereupon refused to accept service or acknowledge same, whereupon this affiant left true and correct copies of each of the above papers, together with a copy of the petition for writ of error, assignments of error, and prayer, and of the writ of error allowed by Judge Walter H. Sanborn of the United States Circuit Court of Appeals for the Eighth Circuit.

DANA B. VAN DUSEN.

Subscribed in my presence and sworn to before me this 21st day of June, 1922.

[Notarial Seal of Anna L. Howland, Douglas County,
Nebraska.]

ANNA L. HOWLAND,
Notary Public.

Commission expires May 9, 1927.

[Endorsed:] No. 5907. Charles G. Binderup, Plaintiff in Error, vs. Pathe Exchange, Inc., et al. Citation on Writ of Error from Supreme Court, U. S. and service thereof. Filed Jun. 26 1922. E. E. Koch, Clerk.

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In the Supreme Court of the United States.

CHARLES G. BINDERUP, Plaintiff,

VS.

PATHE EXCHANGE, INC., et al., Defendants.

*Affidavit of Service.*STATE OF NEW YORK,
County of New York, ss:

John A. Dill, being first duly sworn, deposes and says that on the 23 day of June, 1922, he personally served upon William Marston Seabury in person at his office in the City of New York, in the State of New York, by delivering to him in person and by leaving one copy in his possession the original citation in the above-entitled case bearing the signature of Walter H. Sanborn, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, and addressed to said William Marston Seabury as counsel for the respondents in the above-entitled case, together with copy of same; also the original precept of the petitioner in the above-entitled case specifying the portions of the record to be printed and directed to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, together with a copy of same; and also the petition and brief on behalf of petitioner in the above-entitled case, together with copy of each of same; and he further states that having made such service of such original papers, he then and there left with the said William Marston Seabury a true and correct copy of each of same.

JOHN A. DILL.

Subscribed in my presence and sworn to before me this 23d day of June, 1922.

[Seal of John J. Monahan, Notary Public, New York
County.]

JOHN J. MONAHAN,
Notary Public.Notary Public New York County.
New York County Clerk's No. 210.
New York Register's No. 4170.

Form 1.

No. 12728, Series B.

STATE OF NEW YORK,
County of New York, ss:

I, James A. Donegan, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That John J. Monahan whose

name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 24 day of June 1922.

JAMES A. DONEGAN,
Clerk.

[Endorsed:] No. 5907. Charles G. Binderup, Plaintiff in Error, vs. Pathe Exchange, Inc., et al. Affidavit of Service of Citation on Writ of Error, Præcipe for Transcript and Petition for Writ of Certiorari on W. M. Seabury. Filed Jun. 26 1922. E. E. Koch, Clerk.

204 (*Præcipe for Transcript on Writ of Error from Supreme Court U. S.*)

In the United States Circuit Court of Appeals for the Eighth Circuit

No. 5907.

CHARLES G. BINDERUP, Plaintiff in Error,

vs.

PATHE EXCHANGE, INC., et al., Defendants in Error.

To the Clerk of the United States Circuit Court of Appeals, Eighth Circuit:

Please prepare a transcript of record in the above case to be used in connection with the application of Charles G. Binderup, plaintiff in error, to the Supreme Court of the United States, for Writ of Error.

Let the transcript consist of the following:

1. The complaint (Record, Circuit Court, page 1).
2. Jury impaneled (Record, Circuit Court, page 100).
3. Trial (Record, Circuit Court, page 101).
4. Leave to amend complaint, verdict and judgment (Record, Circuit Court, page 101).

5. Judgment (Record, Circuit Court, page 102).
6. Complete bill of exceptions (Record, Circuit Court, pages 102 to 127).
7. Assignment of errors (Record, Circuit Court, page 128).
8. Petition for writ of error (Record, Circuit Court, page 129).
9. Order allowing writ of error (Record, Circuit Court, page 130).
10. Writ of error and clerk's return (Record, Circuit Court, page 130).
11. Citation and acknowledgment of service (Record, Circuit Court, page 132).
- 205 12. Præcipe for transcript (Record, Circuit Court, page 133).
13. Bond on writ of error (Record, Circuit Court, page 135).
14. Stipulation as to additional matter to be included in transcript on writ of error (Record, Circuit Court, page 136).
15. Additional præcipe for transcript (Record, Circuit Court, page 137).
16. Clerk's præcipe for transcript (Record, Circuit Court, page 137).
17. Complete supplemental transcript of record (Record, Circuit Court, pages 139 to 146).
18. Complete second supplemental transcript of record (Record, Circuit Court, pages 147 to 175).
19. Complete record of all proceedings in the Circuit Court of Appeals.
20. Majority and dissenting opinions of the Circuit Court of Appeals.
21. All of the proceedings and papers in connection with the prosecution of this appeal, including the bond, petition for the writ, assignment of error, prayer for reversal, order allowing the writ, the writ itself, this præcipe and the citation.

CHARLES G. BINDERUP,
Plaintiff in Error,
By DANA B. VAN DUSEN,
His Counsel.

Acknowledgment of Service.

Service of a copy of the above præcipe is acknowledged upon the date set opposite our names.

— —, 1922.

June 19, 1922.

— —,
Counsel for Corporate Defendants.

EUGENE N. BLAZER,
*Counsel for Individual Defendants and
Omaha Film Board of Trade.*

206 June 19, 1922.

ARTHUR F. MULLEN,
*Counsel for Defendants A. H. Blank and
C. E. Holah and All of the Corporate Defendants.*

— —, 1922.

— —,
Counsel for All of the Defendants in Error.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jun. 26, 1922.

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(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record and the additional transcripts of record from the District Court of the United States for the District of Nebraska, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain case wherein Charles G. Binderup was Plaintiff in Error, and the Pathe Exchange, Inc., et al., were Defendants in Error, No. 5907, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the second day of June, A. D. 1922, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Judges of the District Court of the United States for the District of Nebraska.

I do further certify that the original writ of error with the Clerk's return endorsed thereon, the original citation with acknowledgment of service endorsed thereon and original affidavits of service of Citation, etc., are hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this first day of July, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,

*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

208

In the Supreme Court of the United States.

No. 478.

CHARLES G. BINDERUP, Plaintiff in Error,

VS.

PATHE EXCHANGE, INC., et al., Defendants in Error.

Specification of Parts of Record to be Printed.

To Honorable William R. Stansbury, Clerk of Supreme Court of the United States:

Plaintiff in Error states to the court that the only issue involved in this case and the only error assigned by plaintiff in error and upon which he intends solely to rely is that the court erred in deciding that the petition and opening statement failed to state facts sufficient to constitute a cause of action under the Sherman Anti-trust Act.

Plaintiff in error states that the record in the United States Circuit Court of Appeals for the Eighth Circuit, pages 19 to 99, inclusive, contain the answers of the various defendants in error, which were included in the record at the special instance and request of the defendants in error, and at their expense and solely by virtue of a special stipulation between the parties allowing them to be used in the United States Circuit Court of Appeals.

Plaintiff in error further states that said answers are immaterial in consideration of the error alleged and relied upon and are not legally entitled to constitute a part of the record.

For the foregoing reasons the Clerk of the Court is respectfully requested to omit the matters described in preparing the *the* printed record in this case.

CHARLES G. BINDERUP,
Plaintiff in Error.

By NORRIS BROWN,
IRVING F. BAXTER,
DANA B. VAN DUSEN,
C. P. ANDERBERRY,
His Counsel.

209 & 210 Service of a copy of the above request is acknowledged this 14 day of July, 1922.

JOHN J. SULLIVAN,
Counsel for Corporate Defendants.

EUGENE N. BLAZER,
*Counsel for Individual Defendants,
and Omaha Film Board of Trade.*

ARTHUR F. MULLEN,
*Counsel for Defendants A. H.
Blank and C. E. Holah.*

Counsel for All of the Defendants in Error.

211 [Endorsed:] File No. 29028. Supreme Court U. S., October Term, 1922. Term No. 478. Charles G. Binderup, Plaintiff in Error, vs. Pathe Exchange, Inc., et al. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed. Filed July 18, 1922.

212 Supreme Court of the United States.

478.

CHARLES G. BINDERUP, Plaintiff in Error,
against

PATHE EXCHANGE, INC., et al., Defendants in Error.

To the Clerk of the Supreme Court of the United States:

Please include in the transcript of the record in the above entitled cause, to be used in connection with the Writ of Error to the Supreme Court of the United States obtained on or about June 6, 1922, by Charles G. Binderup to review the judgment in the above entitled cause as rendered in the Circuit Court of Appeals for the Eighth Circuit, the following portions of the record in said Circuit Court of Appeals:

1. In addition to the portions of the record designated by the plaintiff in error, please include all portions of the transcript of the record of the Circuit Court of Appeals from and including page 19 to and including page 99.

Dated, June 29th, 1922.

VITAGRAPH, INC.,

One of the Defendants Above Named,

By Its Counsel, W. M. SEABURY.

WILLIAM MARSTON SEABURY.

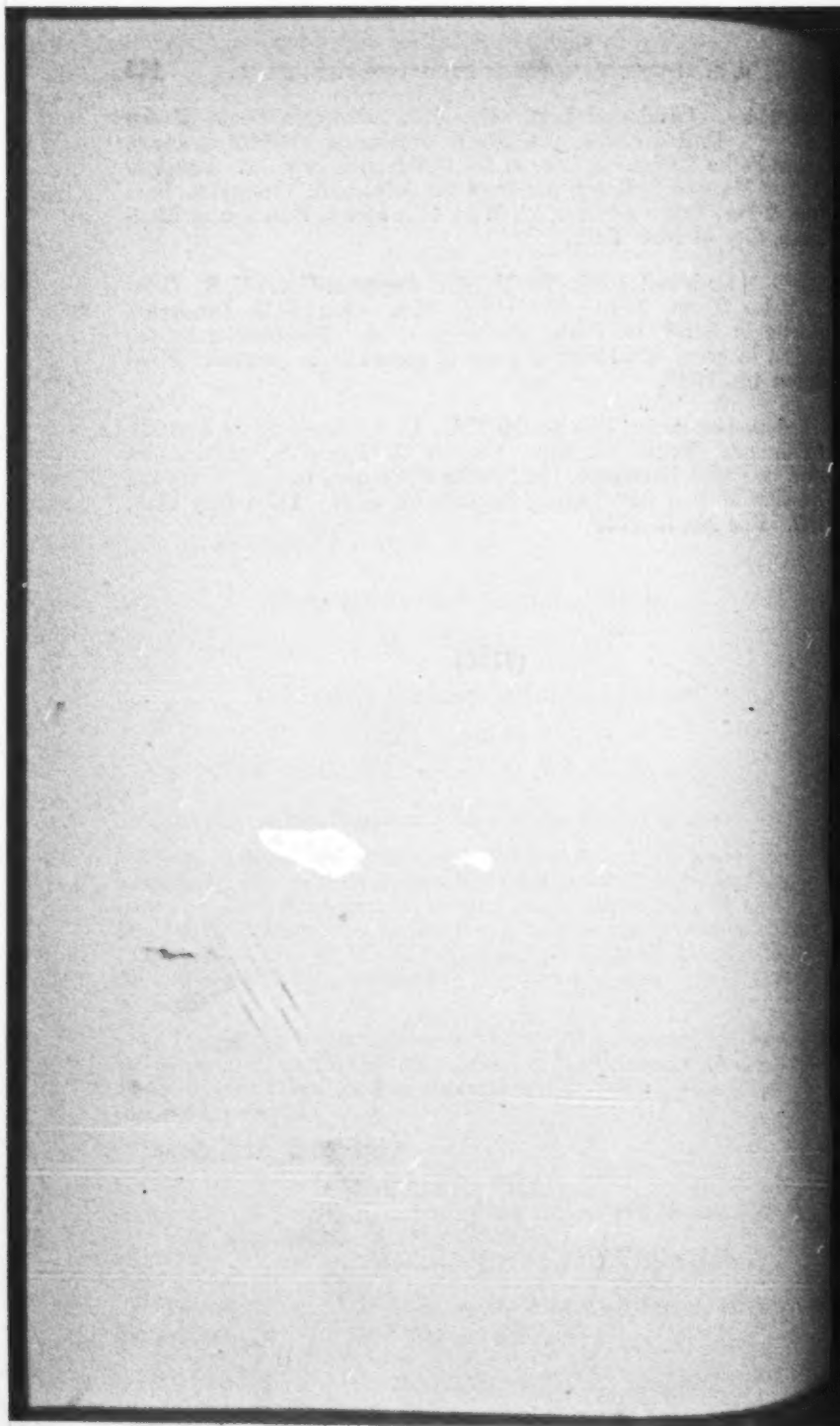
Office and Post Office Address, 28 West 44th Street, Borough of Manhattan, City of New York.

213 & 214 [Endorsed:] 29,028. 478. Supreme Court of the United States. Charles G. Binderup, Plaintiff in error, against Pathe Exchange, Inc., et al., Defendants in error. Præcipe. William Marston Seabury, Attorney for defendant, Vitagraph, Inc., Office & Post Office Address, 28 West 44th Street, Borough of Manhattan, City of New York.

215 [Endorsed:] File No. 29,028. Supreme Court U. S. October Term, 1922. Term No. 478. Charles G. Binderup, plaintiff in Error, vs. Pathé Exchange et al. Designation by defendant in error of additional parts of record to be printed. Filed August 4th, 1922.

Endorsed on cover: File No. 29,028. U. S. Circuit Court Appeals, 8th Circuit. Term No. 478. Charles G. Binderup, plaintiff in error, vs. Pathe Exchange, Inc., Pathe Exchange, Inc., of Nebraska, Exhibitor Mutual Distributing Corporation, et al. Filed July 11th, 1922. File No. 29,028.

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When the sufficiency of a complaint to allege a cause of action under the Sherman Act is first challenged after issue has been joined and by motion for judgment on the complaint and opening statement, the RULE OF CONSTRUCTION is that the pleadings will be liberally construed; and the motion will not be sustained unless there is a total failure to allege some matter which is essential to the relief sought.....	12
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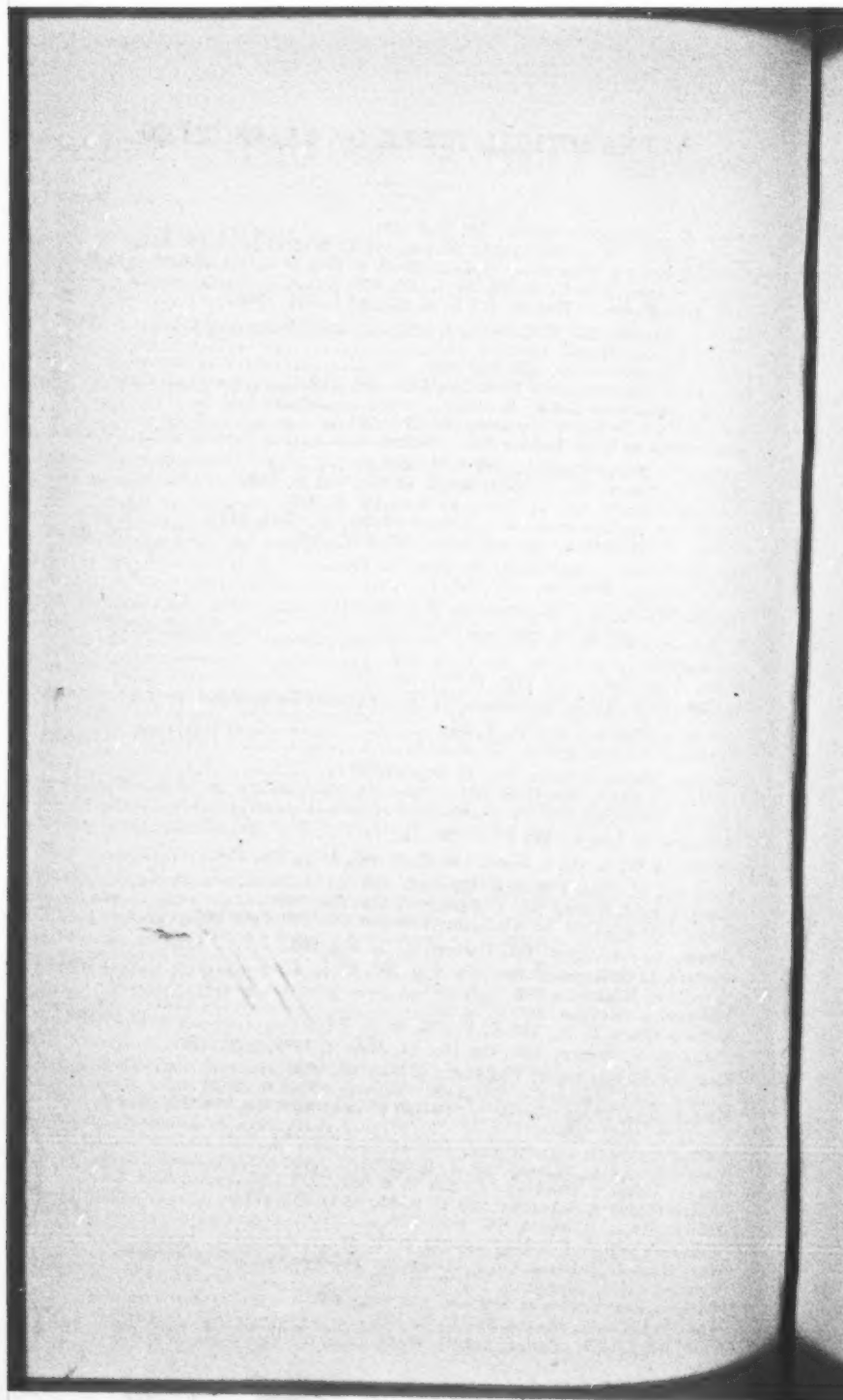
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Supreme Court of the United States

October Term, 1922

No. 478

CHARLES G. BINDERUP,
Plaintiff in Error,
vs.

PATHE EXCHANGE, INC., ET AL,
Defendants in Error.

**IN ERROR TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

BRIEF OF PLAINTIFF IN ERROR

NATURE OF THE CASE AND THE ISSUES

This is a civil action for three-fold damages in the total amount of \$750,000.00 under the Sherman Anti-Trust Act. The plaintiff in error is a resident of the State of Nebraska and was engaged in or connected with the operation of twenty-eight motion picture theatres, all within the State of Nebraska. The defendants in error are, first, nineteen New York corporations engaged either in the manufacture or distribution of motion picture films, or both; seventeen individuals who were the branch managers at Omaha, Nebraska, of the corporations above referred to; the Omaha Film Board of Trade (a trade association formed by and including most of the other defendants); and the individual

who was the attorney for the Omaha Film Board of Trade. The plaintiff alleges that his business was utterly destroyed by a conspiracy in violation of the Sherman Act which was participated in by all of the defendants.

The defendants filed no motions against this complaint. Answers were filed by all of the defendants, denying some of the allegations of the complaint, admitting others, and also alleging new matter in the nature of a plea in confession and avoidance. A reply was filed denying the allegations of the answer. A jury was impaneled, counsel for both plaintiff and defendants made their opening statements, after which, and before the submission of any testimony, counsel for defendants moved as follows (Rec., p. 126):

"I now move on the petition and opening of plaintiff's counsel, separately in behalf of each of the defendants, for a directed verdict as to each on the ground that the *petition and opening* fails to state facts sufficient to constitute a *cause of action* arising under the Sherman Act or any act amendatory thereof."

The Court charged the jury as follows (Rec., p. 126):

"We have had a long threshing-out of questions of law presented by the parties in this case, and I have had the benefit of the arguments of counsel and the citation of authorities by both. I have given the matter consideration and have reached the conclusion that, as a matter of law, there is *nothing that will justify a finding against the defendants* here, and that it is our duty to return a verdict for the defendants. The responsibility rests entirely on the court where a case goes off in this way on a question of law, and it is not the responsibility of the jury. The clerk has prepared a form of verdict and I will ask the gentleman on this end to step forward as foreman of the jury and to sign the verdict as the verdict of the jury."

Exception was duly taken and allowed to this instruction. The verdict of the jury was as follows (Rec., p. 102):

"We, the jury in the above entitled cause, find in favor of the defendants herein."

Thereafter the Court entered judgment as follows:

"At this time, to-wit, November 5th, 1921, it being brought to the attention of the court that the final judgment rendered herein April 20, 1921, was not, through an inadvertance of the clerk, fully spread upon the court journal.

"WHEREFORE, IT IS CONSIDERED AND ADJUDGED, nunc pro tunc, that judgment be and hereby is entered upon the verdict herein in favor of the defendants and against the plaintiff, and that this cause be and hereby is dismissed and that plaintiff pay the costs, and that defendants have execution therefor.

"IT IS FURTHER ORDERED AND ADJUDGED, that the record of this cause pending in error proceedings in the United States Circuit Court of Appeals for the Eighth Circuit shall be supplemented by a certified transcript hereof."

Plaintiff in error perfected his appeal to the Circuit Court of Appeals, and thereafter the Defendants in Error filed their motion to dismiss the appeal on the ground that the remedy of Plaintiff in Error was solely by appeal direct to the Supreme Court of the United States. This motion was overruled, the court finding that the trial court sustained the jurisdiction but denied the merits of the case.

The case then came on for hearing before the Circuit Court of Appeals, which, through Judge Treiber, District Judge, rendered an opinion to the effect that the courts of the United States had no jurisdiction of the case because no interstate commerce was involved. A dissenting opinion was filed by Judge Sanborn, presiding Judge of the Eighth Circuit, holding that the facts set forth in the petition showed a conspiracy in restraint of interstate commerce.

Appeal was taken to this Court, the Supreme Court of

the United States, both by certiorari and by writ of error. The application for certiorari has heretofore been denied.

The principal issue before this Court is, therefore, whether or not the transactions between the plaintiff in error and the defendants in error constituted, or directly affected, interstate commerce, and this question must be determined solely from an examination of the complaint *and opening statement* of plaintiff's counsel to the jury, for which purpose the allegations thereof must be taken as true. The secondary issue is whether the acts complained of placed an illegal restraint upon such interstate commerce as may be found to have existed.

STATEMENT OF FACTS

Plaintiff in error was, prior to the acts complained of, engaged in the business of an exhibitor of motion pictures, himself operating several theatres all within the State of Nebraska, and he was also engaged in the business of *selecting* motion picture films from the defendants in error and supplying them, in the form of complete or balanced programs, to a large number of independent motion picture theatres all situated inside of the State of Nebraska.

While it is well known that motion pictures are frequently enacted in California, it is alleged in the complaint that all motion pictures available to your petitioner are actually manufactured and put into commercial form in the State of New York. The New York corporations which manufacture and own these films, although at first distributing their product direct to users thereof, found, as their business developed to gigantic proportions, that it was impossible to distribute films to the vast number of theatre operators all over the United States directly out of their New York offices. Consequently, in recent years, they have developed a system for distribution by establishing, in the principal cities of the United States, branch agencies called

"exchanges," through which the distribution of their films is effected. Each of these branch agencies solicits orders and distributes films throughout its allotted territory, which is known as a "zone." *A most striking and important fact with regard to the Omaha zone is that the territory embraced therein is the same for each and all of the manufacturers and distributors.* The territory allotted by all defendants to their Omaha agencies comprises the whole or parts of four states, namely, Nebraska, Iowa, South Dakota and Minnesota. *Under the rules maintained by all defendants, plaintiff and all others in his zone, could not buy films direct from New York nor through any other agency or zone, but only through the Omaha branches.* No films are manufactured in Nebraska and none distributed in that state except those of the defendants, so that plaintiff was entirely dependent upon the Omaha offices of these defendants for his supply.

Only a limited number of copies of each picture are manufactured, and since the films are only leased and never sold, one copy of the picture successively serves many different theatre operators. Thus only two copies of each picture are circulated in the Omaha zone of four states, comprising four hundred and fifty theatres. Consequently, it must frequently occur that each of the films sent to the Omaha agents is bound by contracts with various exhibitors to move from point to point from and to the four hundred and fifty theatres in the Omaha zone of four states. Depending upon the dates for which the respective film exhibitors had contracted for the exhibition of the particular film, it might move from Nebraska into Iowa, back into Nebraska, back into Iowa, then into South Dakota, then into Minnesota, and back into Nebraska. Except when films came direct from New York, it would be impossible to tell from whence a particular film actually came to plaintiff in error under any one of his contracts, without tracing its move-

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ments from exhibitor to exhibitor throughout the zone, and through the hands of the Omaha agencies.

In paragraph 21½ of the complaint (Rec., p. 6) it is shown that at some time during the course of manufacture of the film, the New York manufacturer and distributor would announce that the picture was "released," which meant that the agents throughout the country could proceed to solicit and book orders for the exhibition of such film. The manner of entering into contracts pursuant to such solicitation is shown in paragraph 42½ of the complaint (Rec., p. 10), which paragraph makes the contracts, Exhibits A, B, and C, a part of the complaint. (Rec. pp. 134, 139, 142).

EXHIBIT A is a contract between plaintiff and "Goldwyn Distributing Corporation, Executive Offices, 16 East 42d Street, New York City," and signed "countersigned and approved at New York City (signature illegible), Vice President." This contract was arranged through the Kansas City office. It was dated July 26, 1918, and executed at New York two weeks later on August 7, 1918. It provided for the delivery to plaintiff at the Kansas City "Branch Office" of 26 motion pictures, beginning September 27, 1918, and every two weeks thereafter, until September 27, 1919. The pictures referred to are not identified by name, but are described as those "released" at two-week intervals from September 9, 1917, until September 9, 1918. (Rec. p. 134.)

EXHIBIT B is a contract between plaintiff and Vitagraph-Lubin-Selig-Essanay, Inc., "a corporation of the State of New York" (etc.), dated October 29, 1918, and calling for the delivery to plaintiff "at the office of the distributor" one picture for exhibition on November 8 and 9, 1918. It is signed by a "salesman," countersigned by the "branch manager" and "approved" by an official of the company. (Rec. p. 142).

EXHIBIT C is a contract between plaintiff and Famous Players-Lasky Corporation "for Season 1918-1919." It calls for the delivery of two Mary Pickford pictures at an indefinite date which the company is to determine, giving plaintiff three weeks notice of its decision. (Rec. p. 139.)

All these contracts are made in the name of the New York Companies, are executed in New York by officials of the company, provide that they shall be deemed agreements made in New York and construed according to the laws of that State, and state that *delivery shall be made at the "branch office."* They further provide that after use the film shall be forwarded to such point as may be designated by the branch office.

Films, however, are subject to repeated use until such use results in their destruction. Consequently many contracts would necessarily be entered into *after* the manufacture of the film had been completed and it had been in course of exhibition for some time. It is shown by the answers, uniform in character for all of the defendants, that no more than two to five copies of each picture were sent to the Omaha branch agencies for distribution among the four hundred fifty theatres in the four states of Nebraska, Iowa, South Dakota and Minnesota, or parts thereof. Necessarily, therefore, if all the prints assigned to the Omaha agencies were in actual use at the time plaintiff might desire to display a picture, it would be necessary for an additional copy to be obtained by the Omaha branch either from some other branch office or direct from the factory at New York.

The circumstances just described introduce variations into the dealings between plaintiff and defendants. These are referred to in paragraph 41 of the complaint (Rec., p. 9) where it is stated: "It frequently became necessary in order to supply the demand of the plaintiff in that respect for the said defendants to procure at points outside the State of Nebraska, moving picture films." This allegation was

amplified in the opening statement of counsel for plaintiff (Rec., pp. 94-95) when he stated: "Now to explain, the Omaha Film Exchange would not have on hand a particular film which they *had agreed* to furnish plaintiff but they would procure the same some times from Chicago or Minneapolis or New York or different places * * * and he had to make his application and arrangement with the branch houses and they would endeavor to fill his needs from what they had on hand or by getting it from some other zone or district or from the City of New York for that purpose."

Plaintiff in error filed his complaint, as aforesaid, alleging in substance that the defendants in error, each and all of them, with the motive of destroying the business of plaintiff and securing control of the motion picture industry, combined, confederated and conspired to commit a large number of alleged illegal acts causing injury to plaintiff, the principal act alleged being that each and all of the defendants conspired and agreed to refuse to lease, sell or deliver to plaintiff any motion picture films upon any terms or conditions whatsoever at any time or for any purpose. Plaintiff further alleged that he was unable to secure motion picture films from any other source and that by the acts of defendants his business was totally destroyed.

One of the means by which the alleged conspiracy was consummated was the Omaha Film Board of Trade, which, by placing plaintiff upon a black list and by compelling or persuading all of its members, and the few remaining distributors of pictures in Nebraska who were not members, to refuse all further dealings with the plaintiff, destroyed his business. This organization was the means of securing concerted action. It was an association of the managers of the Omaha branches of the New York defendants. The dues were paid by the New York defendants, and the membership was not personal to the individual, but pertained to the office of the local manager. Membership was restricted to persons engaged in the motion picture business

who maintained an office in Omaha, thus excluding all other persons in the zone of four states. The *professed* purpose of the organization was to make reports on the credit and standing of persons engaged in the industry, whether members or not, and the articles of incorporation (Articles 14, 16, 18, 19 and 32) (Rec. p. 123 ff.) bind the New York defendants to observe the rules and regulations and to pay any fines assessed against them.

The acts complained of as being illegal and done in furtherance of an illegal conspiracy may be summarized as follows:

Imposing upon the use of films the condition that they should be at all times subject to an arbitrary right of recall with or without reason.

Imposing upon the use of films the condition that they should be used only in connection with advertising matter purchased from defendants.

Cutting prices in plaintiff's territory for the purpose of putting him out of business.

Coercing plaintiff to give orders to defendants with whom he did not choose to deal.

Procuring breach of contract by some of the defendants.

Circulating a blacklist, based on charges brought in bad faith for the purpose of crushing plaintiff, among both members and non-members of the organization (Film Board of Trade) employing that list.

False and malicious representations concerning plaintiff made to persons doing business with plaintiff for the purpose of putting him out of business.

Threats to those doing business with plaintiff.

Refusal to serve those who maintained any relations with plaintiff.

Coercing plaintiff to coerce others to abide by the rules or orders of an organization of which neither of them were members (The Film Board of Trade).

Imposing upon plaintiff the condition that he could conduct his business only in one theatre and requiring that one to be actually owned by him.

Imposing upon plaintiff the deposit of money subject to arbitrary forfeit for failure to observe the rules or orders of an organization of which he was not a member, and for failure to observe the unreasonable and illegal conditions imposed upon him.

The refusal of all defendants by virtue of common agreement, for the purpose of destroying plaintiff, to have any further business dealings with him.

That leasing is an act of commerce is settled in *United Shoe Machinery Company v. U. S.*, Adv. Op. No. 13, May 15, 1922, page 420.

PROPOSITIONS RELIED UPON

I.

When the sufficiency of a complaint to allege a cause of action under the Sherman Act is first challenged after issue has been joined and by motion for judgment on the complaint and opening statement, the **RULE OF CONSTRUCTION** is that the pleadings will be liberally construed; and the motion will not be sustained unless there is a total failure to allege some matter which is essential to the relief sought.

II.

Films moving from New York to plaintiff in error through the hands of the Omaha agents of the New York manufacturers, pursuant to contracts **PREVIOUSLY** entered into, move in interstate commerce.

III.

Films moving from points in other states **WITHIN THE OMAHA ZONE** to plaintiff in error, whether moving directly to plaintiff in error or through the hands of the Omaha agencies, move in interstate commerce.

IV.

Particular films which are already at Omaha in the State of Nebraska PRIOR to the execution of contracts between plaintiff in error and the New York manufacturers, still remain in interstate commerce.

V.

It is unnecessary to establish that the films at Omaha remained in interstate commerce, since the conspiracy and combination complained of had a direct effect upon the interstate commerce of bringing films from New York to Omaha both by causing the breach of existing contracts and by rendering it impossible **IN THE FUTURE** to bring films from New York for use by plaintiff in error in the State of Nebraska, thus narrowing the market for the sale of films by foreign manufacturers in Nebraska.

VI.

In view of the fact that motion picture films are never sold, but are leased through branch agencies, being transported continuously between those branch agencies and exhibitors in a zone comprising several states, and finally returning to New York, the business of leasing and distribution of motion picture films is unlike any other business heretofore considered, and consequently it must be held that **MOTION PICTURE FILMS ALWAYS REMAIN IN THE CHANNELS OF INTERSTATE COMMERCE.**

VII.

The Acts of defendants placed a restraint upon interstate commerce in the leasing of motion picture films and sale of advertising matter.

VIII.

The acts complained of placed a restraint on interstate commerce of such a character as to constitute a violation of the Sherman Act.

ARGUMENT

I.

When the sufficiency of a complaint to allege a cause of action under the Sherman Act is first challenged after issue has been joined and by motion for judgment on the complaint and opening statement, the rule of construction is that the pleadings will be liberally construed; and the motion will not be sustained unless there is a total failure to allege some matter which is essential to the relief sought.

The proposition stated is one which is firmly established in the State of Nebraska, in which these proceedings arose.

Frye v. Ky., 183 N. W. 567 (Nebr., 1921), 106 Neb. 333.

See also Nebraska cases discussed and followed in

Adams & Frederick v. Bank, 123 Fed. 641 (8 C. C. A.)

For the rule of the Federal Courts, see:

Loewe v. Lawlor, 208 U. S. 274.

Swift & Co. v. United States, 49 L. Ed. 518, 196 U. S. 375.

Pennsylvania Mining Co. v. Jarnigan, 222 Fed. 889, (8 C. C. A.)

Western Real Estate v. Hughes, 172 Fed. 206 (8 C.C.A.)

Buckeye Powder Co. v. Dupont, 196 Fed. 514.

Ware-Kramer Tobacco Co. v. American Tobacco Co., 178 Fed. 117.

Dowd v. Mine Workers, 235 Fed. 1, (8 C. C. A.)

Peoples Tobacco Co. v. American Tobacco Co., 170 Fed. 396.

The trial court decided against the plaintiff on the basis of a rule of strict construction against the petition.

The Circuit Court of Appeals decided against the plaintiff upon a clear misapprehension of the facts stated in that petition.

The plaintiff is entitled to the benefit of the rule set forth in these decisions.

ERRORS IN THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS

The majority opinion written by District Judge Trieber in the Circuit Court of Appeals states as the basis of fact for the conclusion reached the following:

"From the allegations in the complaint it is apparent that no shipments of programs, films or advertising matter are ever made from the City of New York to the motion picture theatres, but they are shipped to their respective branch offices in Omaha, Nebraska, and by them leased and furnished to the plaintiff or other theatres from their storehouses in Omaha. That being the fact, they had reached their destination in the movement from New York and had come at rest in Omaha, and thereupon they ceased to be in interstate commerce unless shipped from Omaha to another state, when they would again be in interstate *transportation*, but independently of the former shipment from New York.

* * * *There is no allegation in the complaint of the case at bar that his orders for films were sent from New York or any other state and shipped to the Omaha branch for delivery to him. On the contrary, the allegations are that after receipt of them by the managers of the Omaha branch, plaintiff would lease them from the manager."*

The facts stated are both incomplete and incorrect, and the theory of commerce expressed is fallacious. The learned District Judge overlooked the allegation of the complaint that the usual course of business was for the contracts to be made in New York and prior to the time the films left the New York factories. **Complaint**, par. 21½ (Rec., p. 6), par. 42½ (Rec., p. 10), Exhibits A, B, C, (Rec., pp. 134-139-142), par. 41 (Rec., p. 9), **Statement** (Rec., pp. 94, 95). He further overlooked the fact that after the films arrived in the hands of the Omaha agents, they continued to move from exhibitor to exhibitor throughout a zone of four states, and that since plaintiff in error was only one of a large number of exhibitors in four states using

the same film, it was constantly crossing state lines and might equally as well come to him from another state as from within the State of Nebraska. He further overlooked the fact that the refusal of defendants to supply plaintiff with films applied to all films to be manufactured and shipped in the future from New York to the Omaha agencies. He further did not observe the fact that the rule which prevented plaintiff from leasing films direct from New York or from any other zone office of the defendants combined with the concerted refusal of all business dealing at Omaha, resulted in depriving plaintiff of an opportunity to purchase motion picture films anywhere in the United States. An opinion based upon a fundamental misunderstanding of the facts and also omitting all consideration of other material facts is certainly of doubtful weight.

This opinion follows the printed argument of defendant in error in the court below. The defendants' statement and discussion of the facts differ so radically from the plaintiff's statement that one or the other is wrong to the point of unfair representation. Such a dispute can only be settled by a careful reading of the entire Complaint and opening statement. It is impracticable to present the entire Complaint and statement here, and improper to present excerpts from it. The court below would not have committed its error had it studied the Complaint and Statement.

The basis of this opinion is further disclosed by the character of the authorities cited to sustain it. Chief among them is the case of *Wagner v. City of Covington*, 251 U. S. 95. Further citations are *American Steel & Wire Company v. Speed*, 192 U. S. 500; *General Oil Co. v. Crain*, 209 U. S. 211; *Bacon v. Illinois*, 227 U. S. 505, etc. These cases are all of them cases involving the constitutionality of state taxation. Furthermore, they are cases based upon a state of facts dissimilar to the facts in the case at bar, because in the cases cited the articles of trade were always already inside the state of the purchaser at the time the contract of sale was made.

DISSENTING OPINION**of the Presiding Judge of the Eighth Circuit**

The primary reason for the dissenting opinion of Judge Sanborn, presiding Judge of the Circuit Court of Appeals for the Eighth Circuit, was that he had a *correct conception of the facts* alleged in the Complaint. His opinion is based upon the allegations of the complaint that the contract is made prior to the shipment of the films from New York, and is made with the New York defendants at their New York offices. His opinion is further *based entirely upon authorities involving the application of the Sherman Anti-trust Act*, with no reference whatever to authorities upon the taxation power of the states. He recognizes the similarity between this case and the case of *Swift & Company v. United States*, 196 U. S. 375. This opinion will commend itself to this Court.

Inapplicability of the Authorities Cited in the Majority Opinion of the Court Below

In the case of *Wagner v. City of Covington*, 251 U. S. 95, which District Judge Trieber says is *conclusive*, the issue was as to the constitutionality of a license tax upon the business of itinerant peddling. A license tax upon the business of itinerant peddling has always been justifiable by virtue of the police power of the states. It is difficult to understand just why or how the business of defendants as conducted through the Omaha agency should be classed as itinerant peddling. The actual measure of the decision is found in the following language:

“It is settled by repeated decisions of this Court that a license regulation or tax of this nature, imposed by a state with respect to the making of such sales of goods within its borders, is *not to be deemed a regulation of or direct burden upon interstate commerce*
• • •”

In other words, the tax is not such a direct interference with and undue burden upon interstate commerce as to render it unconstitutional. By way of dictum the court further states that with regard to the property of a foreign manufacturer which is brought into the state and sold after it has been brought in, such property is the subject of local, and not interstate commerce. The long-established rule, reflected in this dictum, is neither applicable to a case arising under the Sherman Anti-Trust Act, nor is it in accord with the method by which the business of these defendants was conducted, as alleged in the Complaint. The case is *conclusive* only of the error of the court below.

It is, of course, one thing to say that the Sherman Act does not apply to the business of itinerant peddling and quite another thing to say that it does not apply to the business of a national corporation which is facilitated by branch distributing agencies.

That decisions with regard to state taxation are almost wholly inapplicable to the determination of questions arising under the Sherman Anti-Trust Act, has now been settled beyond all controversy by this Court. The most recent light upon this subject is found in the opinion by Chief Justice Taft in the case of *Stafford v. Wallace*, May 1, 1922, 42 Sup. Ct. Rep. 397, in which it is said:

"The other cases relied upon by appellants are less relevant than the *Anderson* and *Hopkins* cases. Some of them are tax cases. As to them it is well to bear in mind the words of the court in the *Swift* case, 196 U. S. 400: 'But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress where such interference is deemed necessary for the protection of commerce among the states'."

The learned Chief Justice then proceeds to distinguish and repudiate the very decisions relied upon to support the

opinion of the court below in the case at bar, namely, *Bacon v. Illinois*, 227 U. S. 504; *Brown v. Houston*, 114 U. S. 622; *General Oil Co. v. Crain*, 209 U. S. 211; *American Steel & Wire Co. v. Speed*, 192 U. S. 500.

To the quotation from the *Swift & Company* case, as made by the learned Chief Justice, there might be added the apt remarks of the inferior court in the same case (*U. S. v. Swift*, 122 Fed. 529), which are directly applicable in the case at bar to the films in the hands of the branch agents:

"I need not dwell on the contention of the defendants that the fresh meats [films] in the hands of the agents are subject to ordinary state taxation, or upon the cases cited in this connection. It is enough to say that because a thing can be taxed by the state, it does not follow that it lies outside the body of interstate commerce; for commerce, interstate as well as domestic, is subject to the police and taxing power of the state, so long as the exercise of such power does not interfere with the National Government's exclusive right of regulation."

Many decisions under the Sherman Anti-Trust Act have expressly repudiated these tax decisions. For example, see *Addyston Pipe Co. v. The United States*, 175 U. S. 211; *Butler Bros. v. U. S. Rubber Co.*, 156 Fed. 1; *Lemke v. Farmers Grain Co.*, 42 Sup. Ct. 244; *Hump Hairpin Co. v. Emmerson*, 42 Sup. Ct. 305.

Indeed, this Court in deciding these tax cases themselves has been careful to *confine* their application and effect in the same way. In *American Steel & Wire Co. v. Speed*, 192 U. S. 500, which was relied upon by the court below, this Court stated:

"The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of the state power in view of its nature and operation must be deemed to be in conflict with its paramount authority."

It is well established, in the state police power cases, that property coming into one state from another may be subject to a measure of state control, even when still actually "*moving in commerce from state to state,*" and "*even though still contained in original packages.*" (*Texas Co. v. Brown*, Adv. Op. No. 14, June 1, 1922, page 428.)

In view of all of the foregoing propositions, police or tax power cases can have no controlling application in cases under the Sherman Act.

II.

Films moving from New York to plaintiff through the hands of Omaha agents pursuant to contracts PREVIOUSLY entered into, move in interstate commerce.

The well-established doctrine of this Court in state taxation power cases is, that where the transportation into the state *precedes* the contract of sale, that sale is subject to the tax power of the state; but that where the transportation into the state is *subsequent* to a contract of sale, a tax by the state is unconstitutional. This is the rule which the court below *purported* to follow. Attention is particularly invited to the fact that the court below overlooked the allegations in this case which state that a large share of petitioner's contracts were made prior to the transportation of property from other states to Nebraska. This allegation cannot be ignored on the ground that other methods of dealing are referred to in the complaint or opening statement, because the latter are stated as involving a part only of the transactions between the parties. *This being the method by which the dealings between plaintiff and defendants were conducted, the case at bar comes within the rule of the tax cases themselves, and the very foundation of the opinion below is destroyed, consequently the dissenting opinion is shown to be correct.*

It will be noted that delivery under these prior contracts is not made direct from New York, but through the Omaha agents. Such state of facts brings this case within

the rule of the decision in *Caldwell v. North Carolina*, 187 U. S. 622, in which it is held that it is immaterial whether the delivery is made direct by the foreign principal to the purchaser, or is made through the assistance of a local agent. The question of the effect of the interruption of the transit in the hands of the local agents at Omaha will be dealt with in detail later in this argument. The volume of plaintiff's business was considerable, involving as it did daily exhibitions of several films in each of twenty-eight theatres. It cannot be said, upon motion against the petition, that that part of plaintiff's business which involved transactions as above described was not sufficient to sustain an action under the Sherman Act.

III.

Films moving to plaintiff from points in other states **WITHIN THE OMAHA ZONE**, whether moving directly to your petitioner or through the hands of the Omaha agencies, move in interstate commerce.

A detailed explanation of how films move throughout the Omaha Zone was not set forth in the petition, but sufficient facts are set forth therein to show that films *must necessarily* move from theatre to theatre throughout the zone, repeatedly crossing state lines. These facts were developed in the opening statement of counsel for your petitioner to the jury. It must be remembered that all other exhibitors in the "Omaha Zone" of four states could not obtain films from any other place than the Omaha branch offices of defendants, and that only from two to five copies of each film were assigned to this zone, which fact is set forth in the Answers filed by the defendants in the trial court. Therefore, it is plainly apparent that the interstate movement of each film did not terminate when it arrived at Omaha. It is equally apparent that if your petitioner was not the first exhibitor to use a particular film, then it must be forwarded for his use from some exhibitor within the zone of four states. Under such circumstances it is sub-

mitted that the court, particularly when passing upon the sufficiency of the petition to allege a cause of action, will not draw any nice distinctions between the movement of films direct from a point inside the state of Nebraska to your petitioner and the movement of a film from an adjoining state to your petitioner, but will find sufficient of interstate commerce in the case to warrant a hearing upon the evidence.

The situation where business dealings are a *mixture* of interstate and intrastate transactions is the normal situation, and cannot operate to take a case out from under the Sherman Act. There are many decisions to this effect.

Not only did the Omaha Branches send films to plaintiff from exhibitors in other states, but also plaintiff, through the Omaha Branches, contracted in some instances with other branches, as is seen in the contract, Exhibit A (Rec., p. 134), which was a contract with the Kansas City agency.

These transactions involved a movement in interstate transportation *subsequent* to the execution of the contracts.

It is absurd to say that plaintiff contracted only with reference to films at Omaha at the moment of the execution of the contract, which execution took place in New York at some date subsequent to the solicitation and placing of the order. It is equally absurd to say that these contracts were filled from the stock on hand at Omaha, because that "stock" consisted of unique plays of which only two copies were available for use in four states containing four hundred and fifty theatres. *There can be no such thing as a "stock on hand" under such circumstances.*

With regard to that part of the films which came to plaintiff through the hands of the Omaha branch, rather than from exhibitors in the zone, it might be said that they

were already under contract obligation for return to Omaha by virtue of the contract with other exhibitors. Such arguments find no support in the allegations of the petition. Furthermore, such movement was equally required by plaintiff's contracts, since his contracts also could be filled in no other way than by such transportation. This peculiarity in this peculiar business does not destroy the fundamental situation that such contracts of plaintiff were with regard to articles not then within the State. The effect of the interruption of the transit has been referred to under the preceding proposition, and is discussed at length below.

IV.

Even that part of the films which were already in the state PRIOR to the execution of contracts between plaintiff and the defendants still remained in interstate commerce.

The variations in the course of dealings between plaintiff and defendants has made necessary the subdivision of the argument into several propositions, each dealing with a slightly different state of facts.

The situation discussed in the preceding propositions involved interstate commerce so clearly as to require little discussion, and furthermore, came within the rule of the state tax power cases relied upon in the opinion of the majority below.

The situation now presented for consideration is one which frankly *lies beyond the rule of the state tax power cases referred to*. Does it, therefore, lie outside the field of interstate commerce over which the Sherman Act extends protection?

The divergence between the definitions of interstate commerce in the cases involving the state power of taxation, and the definitions of interstate commerce in cases arising under the Sherman Act, cannot be reconciled. To apply the

same definitions, in the Sherman Act cases, which have been adopted in the tax power cases, will *emasculate the Sherman Act*.

Business conditions have changed in recent years so that today the great industries of the country are conducted through large corporations having huge factories located in one state, and branch agencies with warehouses located in various convenient cities all over the United States. The product of these factories is placed in channels of trade only through these branch agencies and local warehouses. Until the manufactured product terminates its interstate transportation and comes to rest in the branch warehouse, the usual course of business is that no contract has been executed for its sale and the product has not become the subject of *trade* in any way. If the sale of these manufactured products from the branch warehouses to purchasers within the state is beyond the control of Congress through the Sherman Anti-Trust Act and similar legislation, then it is easy to see how the very conditions against which this legislation is directed may escape its control.

While tax power cases have sometimes been cited in support of propositions laid down in Sherman Act cases, nevertheless *no case can be found* where the interstate element of the case—of the business involved or the effect of the alleged conspiracy—was determined solely by reference to the location of the thing dealt in at the moment the contract between the parties was actually executed. That consideration is at most a minor element in the situation.

It is therefore pertinent first to inquire what is the purpose of the New York distributor in causing its films to be transported from New York to its Omaha exchange? Upon arrival at the Omaha exchange has any transaction in trade been completed? Has any article been sold or appropriated to any useful purpose? Has there been any change of ownership or even any change of possession in law? Has

the transportation which the New York owner originally intended been completed? Has the property been sent to the Omaha agent to have any essential function performed upon it? Has its intended destination been reached?

The answer to each of these interrogatories must be negative. Films are sent to Omaha for purposes of sale or lease. That object is not achieved until the film has been leased to as many different persons as possible in four different states. Although the local exchange finds the buyer, it is no more than the solicitor of orders upon behalf of its New York principal. It derives all of its powers from the principal and its acts are the acts of its principal whose long arm reaches from New York into the State of Nebraska. It solicits the order, but does not have the power to enter into contract. Solicitation and delivery alone take place within the state.

The subsequent movements from hand to hand throughout four states are controlled by the will of the non-resident principal of the local exchange, who at no time surrenders ownership or control over the film. Not until all of these movements of the film have been completed, and as many fees for exhibition received as possible has the purpose for which the film was transported from New York been completed.

The argument of defendants must of necessity be based upon a separation between the movement of films from New York to the Omaha agencies, and from the Omaha agencies to the plaintiff in Nebraska. This involves the proposition that the films are "at rest" upon arrival at Omaha, and that the subsequent *movement* is intrastate.

Of course the movement from Omaha to Minden, Nebraska, is an intrastate movement, but mere transportation is not the sole, nor indeed the chief test as to whether trade is interstate. If that movement is not interstate, never-

theless the movement from New York to Omaha is. May this last movement be divorced from the other movement, and if so, may it alone be said to involve interstate commerce?

Although the one movement is in intrastate *transportation*, the sale or lease which causes that movement is between parties in different states. Although the identity of the ultimate purchaser may have been indefinite, the New York owner of the film when he shipped it from New York had in contemplation the contract later solicited by a local agent and executed by the foreign principal. The whole transaction is a commercial entity.

Suppose a cargo is sold while in transit between different states: Is the interstate character of the dealings of the parties to be determined by the geographical point at which the cargo has arrived at the instant the contract is made? Is it to be determined by the fact that a local agent consummates the sale, and if so can it make any difference whether he was already resident within the state or rode in from the factory aboard the cargo?

Suppose, in the case at bar, that the New York manufacturers alone conspired, and agreed not to permit their branch agents in Nebraska to deliver any pictures to the plaintiff. Would this not be a conspiracy in restraint of interstate trade? Is the case any weaker because the local agents were also members of that same conspiracy?

The question as to what constitutes a transaction in interstate *trade* is even broader and more inclusive than the question as to what constitutes interstate *transportation*. The latter question has been the subject of extended discussion in many cases involving common carriers. In such class of cases the definition of interstate "commerce" has been greatly extended by the Federal Courts. Inviting attention to only one case of this character, plaintiff cites the

case of *A., T. & S. F. v. Harold*, 241 U. S. 371, 60 L. Ed. 1050, where grain was shipped from Nebraska to Kansas on bill of lading with draft attached. The purchaser paid the draft (title passed in Kansas), and then before delivery, resold the grain in Kansas and rebilled the car to a new destination in Kansas where it was again resold. The question being whether the shipment from the first purchaser in Kansas to the last purchaser in Kansas was intrastate commerce, the court decided that it was interstate.

If any contention is made that the acts of the local agent in the case at bar are such as to *interrupt the continuity* of the interstate movement, it is pointed out first, that the complaint does not show any act other than delivery performed by the local agent, and second, that the answers, *which are not admitted and cannot be taken as true* and which are beyond the scope of the inquiry before the court, show no substantial act performed upon the films other than that of delivery.

Even important acts, such as translation of stock quotations from code into English (*Western Union v. Foster*, 247 U. S. 105), and draining oil from tank cars into barrels (*Western Oil v. Lipscomb*, 244 U. S. 346), do not interrupt the continuity of interstate commerce. The rule by which such continuity is to be determined is well stated in *Champlain Realty Co. v. Town*, 43 S. C. R. 147 (Jan. 15, 1923). The interruption in the case at bar was only incident to efficient distribution.

To separate the shipment from the New York factory to the Omaha branch from the movement from Omaha to the Nebraska exhibitor, is to look solely to the matter of *transportation*. Mere transportation, however, does not constitute trade and therefore does not constitute "commerce" as it must be understood in a discussion of the Sherman Act. The confusion in the use of the words "Interstate Commerce" as meaning mere interstate transportation on

the one hand, and on the other hand as meaning interstate *trade* occasions much fallacious argument.

Suppose a manufacturing plant in New York maintains distributing offices in every state in the Union and sells its products only through its branch offices. The transportation from the factory to the branch office may be "interstate commerce" in a sense, *but it is not interstate TRADE*. If the transportation from New York to the branch house is not interstate commerce and if the subsequent sale by the branch agent within his own state is not interstate commerce, then there is no interstate commerce in the industry, in spite of its nation-wide scope. It may be possible to divorce these two parts of the business of the manufacturer for purposes of state taxation or the exercise of the police power of a state, but it is not possible to divorce them in considering the currents of interstate commerce over which the control of the Sherman Act is exerted. *The two transactions together constitute interstate TRADE*. Can not an article of trade have passed from "interstate commerce" in the sense of transportation, and yet be involved in interstate *trade* where the principals to the subsequent intrastate sale themselves reside in different states? It is not necessary here to consider the case where the local branch is separately incorporated in each state. Can there be no interstate commerce between a manufacturer in one state who deals with a citizen of another state through a resident agent?

These vital considerations are not new. The method of business discussed herein has heretofore been before this court. Take the packing industry for example. The reports of the Federal Trade Commission show that the products of the Big Five Packers are actually put into channels of trade and made the subject of "commerce" by distribution through thousands of branch agencies all over the United States. These meat products are not sent to the branch agents to be delivered to purchasers within the state

pursuant to any contracts theretofore made with the packers at their principal offices outside the state. The purchasers are found and the sales made *after* the arrival of the products within the state. These meat products have been held to be subject to state taxation in the cases of *Kehrer v. Stewart*, 197 U. S. 60, and *Armour v. Lacy*, 200 U. S. 226. Nevertheless, the Supreme Court of the United States in the *Swift & Co.* case held that the sales by branch agencies of the packers to purchasers within the same state constituted interstate commerce under the Sherman Act. The theory of this decision was that the actual transportation was not the sole test of interstate commerce, that the fact that the facilities for sale are local does not destroy the interstate character of the business, and that *when the local agent makes a sale it is in legal contemplation a sale by the principal in the foreign state to the purchaser in his own state.*

The decision of the trial court in the *Swift & Co.* case (*U. S. v. Swift*, 122 Fed. 529), and the decision of this court affirming the same (*Swift v. U. S.*, 196 U. S. 375), to which must be added the recent powerful exposition of the Honorable Chief Justice in the case of *Stafford v. Wallace*, 42 Sup. Ct. 397, constitute *a complete analysis of interstate commerce in the live stock industry.* Those decisions take the live animal from the western range through its transportation to the stock yards, through the purchase and sale inside the stock yards into the hands of the packer, through its plant and out of it in the form of meat products, again in transportation to branch agencies in other states, and from those branch houses into the hands of the ultimate purchaser. They establish that this course of trade, *from beginning to end*, constitutes interstate commerce.

These decisions apply equally as well to the business of all other large corporations which distribute their products through branch agencies and warehouses. Regardless of the rights of the states as to taxation, these nation-wide industries are, in all their incidents and dealings, subject to the regulatory power of Congress.

Because of its unusual value in deciding the case at bar, and for the convenience of the court, the language of the three decisions principally relied upon is quoted here at length.

United States v. Swift & Company, 122 Fed. 529:

"Commerce, briefly stated, is the sale or exchange of commodities. But that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—all the *initiatory and intervening acts*, instrumentalities and dealings—that directly bring about the sale or exchange. Thus, though sale or exchange is a commercial act, so also is the solicitation of the drummer, whose occupation it is to bring about the sale or exchange. *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719.

"When commerce, thus broadly defined, is between parties dealing from different states—to be effected so far as the intermediate act of exchange goes by transportation from state to state—it is "commerce" between the states," within the meaning of the constitution, and the statute known as the Sherman Act. *But it is not the transportation that constitutes the transaction of interstate commerce. That is an adjunct only, essential to commerce, but not the sole test. The underlying test is that the transaction, as an entirety, including each part calculated to bring about the result, reaches into two or more states; and that the parties dealing with reference thereto deal from different states.*

"The shipment in the first class of sales is made directly from the places where the meat is prepared to the dealers and consumers in other states, and in the latter class to the agents in the other states, who, upon sale, deliver directly to the dealer and consumer.

"Each of these transactions constitute, in my judgment, interstate commerce.

"*It is none the less interstate commerce merely because the local incidents or facilities for such purchase are to be regarded as outside the interstate character of the transaction. But the purchase of live stock thus brought habitually from other states, relates in its large*

bearings, to a transaction that *had its beginning in other states*. The original shipments are influenced, and to a large extent brought about, by the character of the purchase.

"The purchase, the shipments, and the transportation, are *commercially interdependent*; and in any survey of the transaction, *as an entirety*, none could be omitted. They each go to make the transaction, and covering different states, *they stamp the transaction—not all its incidents, but its essential body—as a transaction in interstate commerce*.

"I think the same is true of meat sent to agents and sold from their stores. The transaction in such case, in reality, is between the purchaser and the agents' principal. The agents represent the principal at the place where the exchange takes place; but the transaction, as a commercial entity, includes the principal and includes him as dealing from his place of business. Indeed, such privity exists between the principal and the transaction, that he could, at the instant, as a citizen of another state, sue upon the transaction in the federal courts; nor have I any question that if the conditions of this case were reversed, so that defendants were invoking the shelter, instead of seeking to escape, the obligations of the commerce clause, federal law would be found equal to the protection asked.

"I need not dwell on the contentions of defendants that the fresh meats in the hands of the agents are subject to ordinary state taxation, or upon the cases cited in this connection. It is enough to say that because a thing can be taxed by the state, it does not follow that it lies outside the body of interstate commerce; for commerce, interstate as well as domestic, is subject to the police and taxing power of the national government's exclusive right of regulation."

Swift & Company v. United States, 49 L. Ed. 518, 196 U. S. 375:

"in the earlier sections (of the bill) the intent alleged is to restrain competition *among themselves*. * * *

"One further observation should be made. *Although the combination alleged embraces restraint and monopoly of trade within a single state*, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable.

"When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, *with only the interruption necessary to find a purchaser at the stock yards*, and when this is a typical, constantly recurring course, the current thus existing is *a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce*. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the *place where the sale in point of law is consummated*. See *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. Ed. 254, 24 Sup. Ct. Rep. 151.

"It should be added that *the cattle in the stock yard are not at rest* even to the extent that we held sufficient to warrant taxation in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365. But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the states, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it.

"The injunction, however, refers not to trade among the states in cattle, concerning which there can be no question of *original packages*, but to trade in fresh meats, as the trade forbidden to be restrained, and it is objected that the trade in fresh meats described in the second and third sections of the bill is not commerce among the states, because the meat is sold at the slaughtering places, or, when sold elsewhere, may be *sold in less than the original packages*. But the allegations of the second section, even if they import a technical passing of title at the slaughtering places, also import that *the sales are to persons in other states*, and that the

shipments to other states are part of the transaction,—‘pursuant to such sales’—and the third section imports that the same things which are sent to agents are sold by them, and sufficiently indicates that *some at least, of the sales, are of the original packages*. Moreover, the sales are by persons in one state to persons in another. But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states.”

Under the analogy of these decisions the stoppage of the films in the hands of the Omaha agents of the New York manufacturers might possibly have subjected them to state taxation but would not terminate their life as a factor in commerce between the states. The instant case is stronger than the Swift case because here the contracts were with the New York principals rather than the local agents. The importance of the approval of these contracts in another state was emphasized by this court in the decision in *Hump Hairpin Co. v. Emmerson*, Adv. Op. No. 12, May 1, 1922 (66 L. Ed.).

The original package idea, developed in the state power cases, does not impair the argument. That theory is equally as inapplicable as the other tax case theories heretofore discussed, and the disastrous consequences of its application in Sherman Act cases is the same. In the *Swift case*, 196 U. S. 375, in referring to the sales by branch houses, the Court said: “*Some at least, of the sales are in the original packages. Moreover, the sales are by persons in one state to persons in another.*” If the industry is in fact nation-wide in scope, and if the principals to the contract of sale reside in different states, the application of the Sherman Act cannot be destroyed by the forms or technicalities of a rule such as that on original packages.

Furthermore, upon the analogy of *Western Union v. Foster*, 247 U. S. 105, and *Western Oil Co. v. Lipscomb*, 244

U. S. 346, the original package theory does not apply to motion picture films handled as described in this complaint. The film in the hands of the branch agent has not yet completed a substantially continuous transportation, nor reached the destination originally intended. Even apart from prior contract, a distributing agency is not a final destination but a mere facility. If it were necessary to come within this theory, it is easy to do so, for *each picture is an unique article and may itself be considered the original package.*

Stafford v. Wallace, Adv. Op. No. 14, May 1, 1922(66 L. Ed.):

"The stockyards are not a place of rest or final destination. * * * The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the west to the east, and from one state to another. Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. * * * *The sales are not, in this aspect, merely local transactions.* They create a local change of title, it is true, but they do not stop the flow; they merely change the private interest in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. * * * The stockyards and the sales are necessary factors in the middle of this current of commerce.

"The application of the commerce clause of the Constitution in the Swift case was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another which are ever flowing, are, in their very essence, the commerce among the states and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream, and take it out of complete national regulation by a nice and technical inquiry into the *noninterstate character of some of its necessary incidents and facilities* when considered alone and without reference to their association

with the movement of which they were an essential but subordinate part."

The language quoted above, as well as the language quoted from the Swift case opinions, can be paraphrased by substituting "films" for "cattle" or "meats" and by substituting "branch agencies" or "exchanges" for "stock-yards." If this is done, that language will apply directly to the motion picture industry. The analogy is so close as to defy distinction, and the defendants are challenged to attempt it.

The situation in the packing industry is very similar to the situation in the grain and oil industries. Grain and oil are both collected into local facilities, such as elevators and storage tanks, from which they are distributed. While thus in storage they may be subject to state taxation, as in *Bacon v. Illinois*, but they are not entirely beyond the control of Congress and the Federal Courts. The scheme of the conduct of the business and the flow of commerce from the seller until the article reaches its ultimate destination in the hands of the buyer, or even the consumer, must be taken into consideration. The control of Congress cannot be confined solely to the act of transportation. Unless the protection of Federal statutes extends to the buyer, and unless the criminal statutes cover the actual sales and delivery to the buyer, the legislation is deprived of its effectiveness. Moving picture exchanges, stock yards, packer branches, grain elevators, oil tanks and warehouses are in reality only the local facilities for the transaction of trade between persons in different states.

Eureka Pipe Line v. Hallahan, 42 Sup. Ct. 101.

United Fuel Gas Co. v. Hallahan, 42 Sup. Ct. 105.

Dahnke-Walker v. Bondurant, 42 Sup. Ct. 106.

Lemke v. Farmers Grain Co., 42 Sup. Ct. 244.

York Mfg. Co. v. Colley, 247 U. S. 21.

Lyng v. Michigan, 138 U. S. 161.

Stewart v. Michigan, 232 U. S. 665.

Stockard v. Morgan, 185 U. S. 27.

Champlain Realty Co. v. Brattleboro, 43 Sup. Ct. R. 146.

The argument in contravention of plaintiff's position and in support of the opinion of the court below, is that dealings between the Omaha agencies and plaintiff in the same state are purely local matters. The same contention was made in the case of *Ramsay v. Associated Bill Posters*, where the Circuit Court of Appeals (271 Fed. 140) said:

"After the posters have arrived at destination, the posting of them by the bill posters is a purely local service."

Upon appeal this Court said (67 L. Ed. 208, Adv. Op. 1922-1923, No. 7):

"We cannot accept this view. As a direct result of the defendants joint acts, plaintiff's interstate business has been greatly limited or destroyed."

Perhaps more similar to the case at bar was the case of *Butler Brothers v. U. S. Rubber Company*, 156 Fed. 1 (8th Cir.) where the property of a non-resident manufacturer in the hands of a local factor for sale to persons within the same state, was held to be still a part of interstate commerce.

In the old but important case of *United States v. Jellicoe Coal Company*, 46 Fed. 432, dealers of coal within the City of Nashville, Tenn., organized the National Coal Exchange for the purpose of controlling the price of coal sold by local dealers in Nashville. Mine owners in other states were induced to join this exchange and agree to sell only to Nashville retailers who were members of the exchange. It was contended that the case was not within the Sherman Act for the reason that the exchange, which was the defendant in the case, combined only to control the price in the State of Tennessee, after delivery to them of coal, the title to which passed to them at the mine before any transportation commenced, and consequently that the combination only imposed a restriction upon the resale within the

State of Tennessee of property which belonged to residents of Tennessee when it came into the state. It was held that the combination violated the Sherman Act because *the transportation of coal from the mines without the state to Nashville was a "necessary incident" without which the execution of the agreement would have been impossible.*

So in the case at bar the transportation of films from New York to Omaha was a "necessary incident" to all future transactions between the contracting parties—the New York defendants and the plaintiff—and it can make no difference whether the film, at the time the contract is fully executed, is in New York, enroute, or actually at Omaha. Here the local dealers are mere agents of non-resident manufacturers and distributors, and not independent persons as in the case cited.

In *Gibbs v. M'Neely*, 107 Fed. 210, the district court had before it for consideration an action for triple damages under the Sherman Act brought by a dealer of shingles in the State of Washington. He bought the shingles from manufacturers within the state, but sold a part of them to purchasers beyond the state. Nevertheless, all of the dealings between plaintiff and defendants were within the state. The defendant was the Washington Shingle Manufacturers Association, which combined the manufacturers and dealers of shingles within the state. This particular kind of shingle was manufactured solely in the State of Washington. The defendants were charged with destroying plaintiff's business, both by inducing Washington manufacturers not to sell to him and also Washington and non-resident dealers not to buy of him. The defendants demurred to his petition on the ground that it failed to set forth facts sufficient to constitute a cause of action under the Sherman Act. The District Judge fell into the same pit of plausibility as the defendants in the case at bar, and sustained the demurrer, saying:

"The defendants manufacture and sell within the state, with the intention that the products sold shall all be used within the state, or transported or sold out of it, as the purchaser shall decide. *The sale and the manufacture cannot be distinguished so far as the question of state control is concerned; both take place within the state; both are equally within its police power; both affect interstate commerce in the secondary sense merely, neither affect it in the primary sense.* As the shingles manufactured are transported and sold in other states, it is done by other agents and combinations, not responsible to the Washington Shingle Manufacturers Association, and not provided for by the contract of the Association. If the plaintiff has suffered injury by reason of the alleged combination, it is within the province of his state to provide him a remedy. This court is without jurisdiction in the premises."

Unfortunately for the defendants herein, the Circuit Court of Appeals of the Ninth Circuit *reversed* the decision above. The court said: (119 Fed. 120)

[This combination] "contains no express provision for the transaction of business across state lines; it does not by its terms refer to the sale or delivery of shingles elsewhere than in the State of Washington. But it cannot be said that such sales and deliveries were not within its contemplation and are not *directly affected by it*. The defendants in error were engaged in manufacturing a product, of which, as they well knew, more than 80% was to be sold, delivered and used in states other than that of its manufacture. They were in the business of selling and delivering shingles to purchasers in other states. * * * *It is immaterial that all the parties to the agreement were residents of the same state. It is not the place where the parties reside that distinguishes the combination, and lends to it the features of a combination in restraint of interstate trade. A case in point is Chesapeake & Ohio Fuel Company v. U. S., 115 Fed. 610* * * * The plaintiff in error is in the business of buying the manufactured article in the state where it is manufactured and selling to purchasers in other states. * * *

and the acts of the defendants are in restraint of the interstate commerce in which *he* is engaged. We think the complaint states a cause of action."

In conclusion, may it be again asked if the test of whether an industry is engaged in interstate commerce is that it has or does not have local representatives in each state? Is the test of interstate commerce to be whether or not the goods have already arrived in the state of the purchaser when the contract of sale is made? Is the temporary lease within the state of an article moving from state to state no different from the final sale of property within the state?

To hold that the establishment of this convenience for transportation, distribution and sale destroys the interstate character of the business is to establish a technical and frivolous definition of interstate commerce. It is looking at the form and not the substance. It is shearing the Sherman Act of its power and depriving Congress of its constitutional authority and definitely curtailing the jurisdiction of the Federal Courts. It opens the way to a simple expedient by which those engaged in interstate commerce, who find the restrictions of Federal law and the rules of the Federal courts too distasteful may defeat them.

V.

It is unnecessary to establish that the films at Omaha remained in interstate commerce since the conspiracy complained of had a direct effect upon the interstate commerce of bringing films from New York to Omaha by rendering it impossible **IN THE FUTURE** to bring films from New York for use by plaintiff in the State of Nebraska, thus narrowing the market for the sale of films by foreign manufacturers within the State of Nebraska.

It is alleged in the complaint that no films are manufactured in the State of Nebraska. It is further alleged that your petitioner could only obtain films which are shipped from New York into Nebraska. The combination com-

plained of operated not only upon films then on hand at the branch agencies in Omaha, but operated upon all films not yet released or not yet manufactured by the New York manufacturers.

All Sherman Act cases look to *future dealings* as much as to past and present dealings or contracts. *In this they differ from the state taxation cases relied upon by the court below.* In the latter cases the courts look to the situs of the thing taxed at the moment the tax is sought to be enforced against it. The inquiry is whether the articles or things in question are a part of the stock in trade within the state. Is that the enquiry in the Sherman Act cases? No. Every one of the latter looks to the future trade which has been cut off or obstructed, or to the natural channel of trade which has been artificially diverted, impeded or destroyed. In the case at bar, the defendants did not say they would not furnish any more films from such "stock" as they then had at Omaha, but they said to plaintiff: "*You cannot have any films whether now on hand at Omaha, now under contract with you, or whether still at New York, or in other states, or even not yet manufactured.*" The New York manufacturers said: "*We will not ship any films to our Omaha agents for your use. Being in the Omaha zone, you could buy only there, and now you cannot buy anywhere.*" Does not this affect and involve interstate commerce? Suppose films were sold, not leased, and that plaintiff was the only user in Nebraska; then under the above declaration by the manufacturers, the channel of trade between New York and Nebraska would have been totally destroyed. Is the rule different because here the channel was only partially destroyed or narrowed? Is any one prepared to say that the use of the lease rather than sales, destroys the interstate element in this case?

Respondents blacklisted your petitioner and in concert refused to deal with him at all. Is not interstate commerce affected when your petitioner cannot anywhere obtain

articles manufactured and *at all times OWNED solely by persons without his state*. Your petitioner could not buy from the branch agencies, in other states, nor from the manufacturers themselves at New York. He was prohibited by rules from buying through any other zones, and the New York manufacturers were parties to the conspiracy with their Omaha agents. **THE SITUATION PRODUCED WAS A NATION-WIDE BOYCOTT.**

Suppose that the branch agencies at Omaha were wholesalers with exclusive agencies for motion picture films and that they combined to prevent your petitioner from obtaining films either from them or direct from the New York manufacturers, so that it was rendered impossible for your petitioner to obtain films from any source whatever. Would this not be a conspiracy in restraint of commerce between the states?

Is not the case at bar even stronger, since the manufacturers themselves combined? Is it not stronger, since the Omaha dealers are mere agents of the manufacturers and not independent wholesalers?

The situation here is analagous to that in the case of *Montague v. Lowry*, 193 U. S. 38, where a combination of wholesalers within the State of California prevented other California wholesalers from obtaining tiles from non-resident manufacturers, who agreed to sell only to members of the association. This Court held that though the sale involved might be intrastate in character, the *effect* of the combination was directly upon interstate commerce in that it *narrowed the market for the sale of tiles by foreign manufacturers within the State of California*.

Just so, in the case at bar, the acts of defendants "narrowed the market for the sale by foreign manufacturers of [films] within the State of [Nebraska]."

The tile manufacturers outside California, correspond to the New York film manufacturers in the case at bar; the wholesalers of tile inside California who were members of the Association, correspond to the Omaha Exchange or Branch officers; and the wholesalers of tile who were not members of the Association, correspond to the plaintiff in the case at bar. Is the case at bar where plaintiff could not obtain any films from any source at any price to be considered weaker because in the Montague case the plaintiff could buy of members of the Association although at an increased price? Manifestly not. The language of the Montague case can be paraphrased and applied directly to the facts of this case, the facts in this case making the conclusion stronger.

Similar are: *Belfi v. U. S.*, 259 Fed. 822, in which the combination was confined to those within the state, and the following:

Boyle v. U. S., 259 Fed. 803.

Knauer v. U. S., 237 Fed. 8 (8th Cir.)

Lowe v. Lawlor, 208 U. S. 274.

Council of Defense v. Magazine Co., 267 Fed. 390 (8th Cir.)

Gibbs v. McNeeley, 107 Fed. 210.

U. S. v. Jellicoe Coal Co., 46 Fed. 432.

U. S. v. Reading Co., 226 U. S. 324.

It is immaterial whether the interstate commerce which is affected takes place prior or subsequent to the intrastate sale.

In *Montague v. Lowry*, the interstate commerce preceded the intrastate sale. In the case of *United States v. Reading Co.*, 226 U. S. 324, the interstate commerce followed the intrastate sale. In the case at bar, in any view of the facts, interstate "commerce" preceded the transaction between the Omaha agents and your petitioner, since the films were transported from New York to Omaha.

Chief Justice Taft, in the case of *United Mine Workers v. Coronado Fuel Company* (June 5, 1922) stated:

"In *United States v. Patten*, 226 U. S. 525, running a corner in cotton in New York City by which the defendants were conspiring to obtain control of the available supply and to enhance the price to all buyers in every market of the country, was held to be a conspiracy to restrain interstate trade *because cotton was the subject of interstate trade* and such control would directly and materially impede and burden the due course of trade among the states and *inflict upon the public the injuries which the Anti-Trust Act was designed to prevent. Although running the corner was not interstate commerce, the necessary effect of the control of the available supply would be to obstruct and restrain interstate commerce*, and so the conspirators were charged with the intent to restrain."

The case of *Knauer v. United States*, 237 Fed. 8, decided by the 8th Circuit in 1916, involved an association of master plumbers within one state, themselves being engaged in intrastate commerce, who combined to prevent outside manufacturers from selling direct to consumers. This was held a combination in violation of the Sherman Act.

In the case of *Council of Defense v. International Magazine Company*, 267 Fed. 390, decided by the 8th Circuit in 1920, the facts were that the International Magazine Company printed magazines in New York and sent them to agents in the large cities throughout the country for distribution. The Council of Defense of New Mexico, a war organization, by use of various forms of publicity, persuaded, first, news dealers to refuse to exhibit magazines of this company, and second, readers to refuse to purchase and read them. This interfered both with the introduction of magazines into the state and also with *the resale within the state by the dealer to the reading public*. It was decided that the acts of this local organization were in violation of the Sherman Act, the court saying:

"All these publications came into the state through interstate commerce. *The only purpose of shipping the magazines into New Mexico was for sale there; hence, the movement which sought to prevent, and was succeeding in preventing news dealers, who were here the importers, from receiving, handling and selling such magazines, directly interfered with that commerce.*"

VI.

Motion picture films always remain in the channels of interstate commerce.

The proposition stated may seem an extreme conception. It is founded, however, upon the peculiar way in which the industry is conducted. These films are manufactured in New York; contracts are made with exhibitors which reserve a right of arbitrary or immediate recall; they are shipped to branch agencies which send them back and forth among exhibitors in a zone of several states; and they finally return to the New York factories to be salvaged. They may come to rest for purposes of state taxation or may become subject to the police power of the state, but they are so caught and held in nation-wide currents of trade that they always remain subject to the control of Congress, and more particularly to the control of the Sherman Act. This industry is unique. Comparisons only serve to prove it in a class by itself. Its distinguishing characteristic is the continuous movement of its product in transportation. The motion picture is the gypsy of commerce.

The transit from hand to hand within the state is but part of the restless commercial life of any film. No one, in any state, can at any time either consume it, employ it as a raw material for a new product, acquire title to it, or in any way hold it more than temporarily within the state. Each succeeding transaction is with the same original seller. One of the parties is always the same. When it moves from Omaha, Nebraska, to Minden, Nebraska, it is already under contract to move thereafter to South Dakota and other states

in the zone. It moves irregularly from state to state and back again according to the dates upon which various exhibitors within the zone demand it for their programs. Always moving under the guidance of a non-resident owner, all that any one acquires is the right to use it to produce a fleeting vision on the screen, returning it intact to the agent of its distant owner, and the stoppage at a given theatre is as fleeting as the vision it produces on the screen.

In all other cases there is a time when interstate commerce can definitely and surely be said to be terminated, and that is most frequently the time when a sale has been consummated and the article has definitely become the property of a person within a state for the purpose of use within that state. Such articles of trade are subject to a change of ownership, or subject to a change of form, or subject to the imposition of a new will, or are made the subjects of a new commercial transaction between wholly different parties. This case is different.

The exhibitor of a motion picture film within the State of Nebraska, unlike the purchaser of an article within the State of Nebraska to whom title and absolute control passes, is engaged in interstate commerce because he is engaged in the business of leasing for temporary use an article which comes from without the state and again leaves him to go beyond the state.

VII.

The acts of defendants placed a restraint upon interstate commerce in the leasing of motion picture films and sale of advertising matter.

Under this proposition it is proposed to discuss only the manner and extent to which trade in motion picture films was restrained by the acts of the defendants, without inquiring into the motive of such acts and without inquiring as to whether or not the restraint imposed was contrary to law.

In the many decisions which have already been handed down under the Sherman Act, it has been clearly indicated that Interstate Commerce is restrained when, although the volume of that commerce is not diminished, and although the price of the article is not enhanced or controlled, the normal, usual and ordinary channel through which that commerce travels is diverted or narrowed by obstacles to its free flow. The courts have had before them industries which involved a channel of commerce from manufacturers to wholesalers, to mail order houses, to mutual associations, and to jobbers, and from these to retailers and from retailers to consumers. The restraints which have been found illegal under the Act have sometimes involved the *elimination* of some of these intermediate agencies of commerce from the channels of commerce; for example, by confining the flow of trade of a given article to the channel from the manufacturer direct to the retailer, or by eliminating mail-order houses. On the other hand, the restraint has sometimes been found illegal where the channel of commerce from the manufacturer direct to the consumer has been diverted to *include* an intermediary agent, such as the wholesaler or jobber. Wherever the natural course of business and natural effect of competition has established the channel in which a given article moves in interstate trade, that channel must be left open. This is particularly true where, as in the case at bar, that channel has been opened up at the request and with the approval and assistance of the manufacturers and distributors.

Whereas, the normal channel of interstate commerce in motion picture films had formerly been from the manufacturer or distributor through its local agent at Omaha to a broker or purchasing agent (Binderup), and then to the exhibitor, the result of the acts of the defendants was to close this channel of interstate trade and to move the film from the agent direct to the exhibitor.

In the case at bar, we have a combination of all the non-

resident manufacturers and distributors of motion picture films with all the local branch offices and managers within a zone of four states. Since these parties control the entire production of motion picture films within the zone, any concerted action on their part which restrains trade in films necessarily restrains interstate commerce.

The defendants agreed in concert to cancel existing contracts for delivery of films to plaintiff and agreed to never in the future supply the plaintiff with any films. In this way the manufacturers and the branch exchanges restrained their own combined trade by refusing to deal with plaintiff.

They entered into a common agreement not to sell to an individual, the plaintiff; they entered into a common agreement not to sell to a class, those operators of theatres who had any connection whatever with the plaintiff; they entered into a common agreement not to sell to operators who did not actually own the theatres in which they carried on their business; they entered into an agreement not to sell to plaintiff by which his trade was restrained both as an independent exhibitor on his own behalf, and also as a broker or purchasing agent on behalf of members of his circuit.

The protection of the statutes is extended to those who buy as well as those who sell an article in interstate commerce. The plaintiff was engaged in buying an article moving in the channels of interstate commerce. *This trade was restrained by being wholly destroyed.*

It is no answer to say that the films as to which restraint was imposed passed only from the Omaha Exchange to plaintiff within the state. This might have been superficially true at the instant of time plaintiff was first refused service, but with regard to future films, either not yet produced or not yet in the hands of the Omaha exchange, it could in no wise be true. While this common agreement

operated in the first instance upon the local exchange, it also acted directly upon the original source of supply and prevented the New York producer or distributor, which under its zoning rules acted solely through its local agent, from at any time supplying plaintiff with its films. Thus a part of the business, about the interstate character of which there can be no doubt, was restrained.

The concerted action of defendants prevented all operators within the zone from employing a common agent to select their programs and insure their film service. The effect upon the exhibitors was to destroy the power of collective bargaining, to compel them to select their own programs and to own the theatres in which they operated.

VIII.

The acts complained of placed a restraint on interstate commerce of such a character as to constitute a violation of the Sherman Act.

It should be borne in mind that conspiracy and intention are difficult of positive proof, and that circumstantial evidence is sufficient to sustain a cause of action of this character.

Of course, the fundamental test of whether or not a given conspiracy or agreement violates the Sherman Act, is whether or not its effects are to restrain or reduce competition. The first inquiry, therefore, must be whether or not there is any competition in the moving picture industry. This inquiry appears advisable for the reason that the defendants below emphasized the proposition that there was no competition between them since each handled its own copyrighted pictures.

Motion pictures are produced for the purpose of being shown to the public in theatres. Each *manufacturer* seeks to produce pictures which will appeal more to the public's

fancy than those of other manufacturers. A given picture having been produced, the manufacturer, or the distributor, as the case may be, seeks to secure its display in as many theatres as possible.

Although each *producer* or distributor may have an exclusive right of sale or lease of a particular picture, he nevertheless must compete for the business of the exhibitor, not only to convince him that that picture is of a desirable class for the particular demands of the patrons of the particular theatre, but also that it is more desirable than any picture offered by all the other producers. Thus, although each motion picture is an unique and copyrighted article, it is no more free from competition than is a given volume of copyrighted summer fiction. Nor is it possible to obtain a picture of a given brilliant performer at all times from a single producer alone, since these performers change their contract arrangements from time to time. Again, the producer and distributor also compete for the business of exhibitors through the terms and conditions upon which their pictures may be obtained, by the physical condition of them, and the promptness with which they are delivered. Finally, there is in this business, as in all others, the element of human relationship, of personality and salesmanship.

What part did plaintiff play in this industry? He acted in a multifold capacity. First, as an owner and exhibitor in one theatre, he was a retailer. Second, as a lessee of and exhibitor in six theatres, he was again a retailer. Third, as operator of the "Binderup Circuit," furnishing, not individual films, but balanced programs to theatres in which he was not interested, but with whom he had contracts to select and provide such programs from any source he saw fit, he appeared in what might seem a dual capacity, according to the viewpoint from which it is considered. From the standpoint of the exhibitors to whom he gave service, he was in a sense, a common purchasing agent. From the standpoint of the defendant distributors, he was, in a sense, a broker.

HE WAS NOT A DISTRIBUTOR IN THE SAME SENSE AS THE PRINCIPAL DISTRIBUTORS, NOR WAS HE A SUB-DISTRIBUTOR IN THAT SENSE, BECAUSE UNLIKE THE OTHERS, HE DEALT IN THE PICTURES OF ALL, AND NOT SIMPLY ONE OF THE PRODUCERS AND DISTRIBUTORS. Since the defendants have sought to justify their wrongful acts by denouncing the plaintiff as being a "sub-distributor," it is well to bear in mind the distinction which has just been pointed out.

With whom did Binderup compete? As an exhibitor he competed with other exhibitors in the effort to attract the public by his programs. As a broker he competed with the distributors. On the other hand, the distributors competed with each other to obtain business from Binderup, both as an exhibitor and as a broker, and furthermore they competed with him in the effort to obtain the business of exhibitors, both within the territory in which his circuit already actually existed (for, as before stated, Binderup had no exclusive contract with these theatres), and also in the territory in which Binderup was endeavoring to expand his circuit.

By destroying plaintiff's business, defendants destroyed competition between themselves for Binderup's trade, and by refusing to deal with exhibitors who had any relationship with him, they destroyed competition among themselves for the business of those other operators. If the article of trade involved in this case was *not* copyrighted, and if defendants did not have the exclusive right of distributing same, there would be no question but that plaintiff as a jobber or broker, was entitled to succeed or fail, according to his ability to give satisfactory service to his patrons. *In spite of the copyright*, plaintiff challenges defendants' right to monopolize the motion picture industry from the producer to the consumer. In the *Motion Picture Patent's case*, the defendants combined to exclude existing jobbers or distributors of motion picture films from the industry. The

combination which brought this about was denounced as in violation of the Sherman Act, and in the opinion in that case, the court laid down the proposition that there was a field of trade within the motion picture industry which must be kept open to all those who desire to engage therein. Under the facts of that case, this can be interpreted only as a declaration that the defendants could not *combine* to exclude others from the field of the distribution of motion picture films. It would appear, therefore, that the defendants have again attempted, on a smaller scale, to accomplish the same thing from which they were restrained in that former decision. However that may be, it would seem clear, since a legitimate business had been built up by plaintiff with the knowledge and consent of defendants, that however free the defendants *individually* might have been to have refused business relations with the plaintiff, they were not at liberty to *combine* in the effort to destroy him.

Even though it be assumed that plaintiff's business was *illegitimate*, the defendants had no right to combine to destroy it. This proposition is strikingly exemplified in the case of *Patterson v. U. S.*, 222 Fed. 599. It appeared that defendant owned a patent on the article in question. It also appeared that another person had engaged in the manufacture and sale of the patented article without right. The defendant then conspired, not with any of its competitors, but *solely among its own officers and agents*, to restrain or destroy plaintiff's illegitimate business. The Circuit Court of Appeals held that a patentee may not conspire in restraint of the interstate trade or commerce of a competitor in the article covered by its patent, even though the competitor's business is an infringement of its patent.

This element of concerted action on the part of defendants is the foundation stone of plaintiff's case. However reprehensible the conduct of plaintiff might be assumed to have been, however worthy the motives of defendants may be assumed to have been, however proper the acts of de-

defendants if undertaken as individuals, there is before the court a situation wherein a number of competitors acting in common accord, have ruined the plaintiff. This brings the case within the rule so clearly laid down in *U. S. v. Schrader*, 64 L. Ed. 471, 252 U. S. 85, where it is demonstrated that that which may be legitimate and normal act in the promotion of the trade of an individual, may be an offense within the Sherman Act when done by more than one in concert.

Clearly, the normal method of buying and selling motion pictures would have been for each of the defendants to have solicited plaintiff's business on their own terms, and if one of the defendants had a grievance against the plaintiff and chose of its own accord to refuse further business relations with him, the normal course of trade would have been for others of the defendants who had no person grievance against the plaintiff, to have continued to deal with him as long as their personal relations were satisfactory. The petition shows that no complaints were made against plaintiff by each and all of the defendants. The specific charges brought against plaintiff before the Omaha Film Board of Trade, and upon which the action of all the defendants was supposed to have been justified, involved the business relations between plaintiff and only one or two of the defendants. Some of the defendants who refused him service after this common understanding had been reached, *had never had any business relations at all with plaintiff therefore.*

The intention of defendants was unlawful, since it was to completely destroy the business of the plaintiff. It was further unlawful because directed not simply at the plaintiff as an individual, but actually at the plaintiff as a class. In other words, the intention of the defendants was to regain or acquire a complete control from producer to consumer, and for this purpose to prevent any one from operating in the capacity in which plaintiff operated on his circuit.

These acts were contrary to the purpose of the Sherman Act. The intention of that act is to preserve the operation of the law of supply and demand. It is the operation of that law of supply and demand and normal competition which enabled the plaintiff to build up his business. Without artificial interference on the part of defendants, plaintiff's business would have continued and expanded.

The illegality of the acts of the defendants may be found in the employment of illegal means to obtain a legal object, or in the employment of legal means to obtain an illegal end. *In the case at bar, both the means and the end were illegal.* The illegal means employed was concerted action of conspiracy, of boycott, the blacklist, slander and libel. The illegal end sought and achieved was the destruction of the business of a competitor and control of the industry.

It is necessary to inquire, however, whether or not the restraint imposed upon interstate trade by the acts of defendants was substantial and direct. Any restraint which completely destroys the business of a competitor must, of course, be substantial. Any restraint on the business of defendants themselves by which all business relations upon the part of any one supplying films were terminated, must likewise be substantial and direct. With regard to whether or not the restraint was substantial, some question may be raised on the ground that just as many films may come into the state and zone subsequent to the acts complained of as prior thereto. Even if this were true, the extent of the market as to every film was restricted, and this was the only way the restraint could operate in this case, because of the peculiar way in which defendants' business was conducted, since the article is leased and not sold. But the final answer to this contention is that it is not necessary that the actual volume of trade be restrained if the free flow of the article of trade in the normal channels of commerce is restrained, diverted or destroyed.

CONCLUSION

The transactions between the parties involved interstate commerce and the conspiracy complained of had a direct effect upon interstate commerce. Since the complaint alleges illegal motives and the employment of illegal means, it cannot now be pertinent for the defendants to discuss, as they did below, matters of defense. The Answers of the defendants, except insofar as they contain admissions favorable to plaintiff, are not entitled to any consideration whatever from this court. Any discussion of facts, or any proposition of law, not having its root in the Complaint, is immaterial at this time. A complaint under the Sherman Act is not, as this court has heretofore stated, capable of the same precision of statement as an ordinary pleading, and under the rule of liberal interpretation of such complaints, plaintiff in the case at bar has unquestionably stated a case good against demurrer. Plaintiff prays that the judgment of the Circuit Court of Appeals be reversed, and that the case be returned to the District Court for trial.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1922

No. 478

CHARLES G. BINDERUP,
Plaintiff in Error,

vs.

PATHE EXCHANGE, INC., ET AL,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION OF DEFENDANTS IN ERROR TO DISMISS

FUNDAMENTAL ERRORS IN ARGUMENT OF DEFENDANTS IN ERROR

This motion to dismiss and the argument in support thereof are founded upon gross errors, both of law and of fact. Those errors are as follows:

1. Defendants in error misstate and incorrectly represent the decision of the trial court as having involved but one point, namely, the jurisdiction of that court as a Federal Court.

2. Defendants in error misstate the motion made by them in the trial court, and upon which the court acted, in that they state that the motion was directed only at the sufficiency of the petition, whereas in fact the motion challenged the sufficiency of the petition as reinforced and

amplified by the opening statement of counsel for the plaintiff to the jury.

3. Defendants in error assert erroneously that the only cases, based upon Federal statutes, which may be taken from the trial court to the Circuit Court of Appeals in cases where a jurisdictional point is involved, are those in which the trial court sustains the jurisdiction, and that the jurisdiction is not sustained unless there is judgment in favor of the plaintiff.

4. Defendants in error rest their argument upon the erroneous proposition that in any case where the action is not founded upon common law, but is founded upon any Federal statute, the sufficiency of the petition to state a cause of action is purely a jurisdictional question, not involving the merits, and that the only possible appeal where the petition is held insufficient to state a cause of action is by direct appeal to the Supreme Court of the United States.

**FOLLOWING IS A CORRECT DESCRIPTION OF THE
PRECISE ACTION OF THE TRIAL COURT
AND THE HISTORY OF THE CASE**

The real issue upon this motion is as to the nature and effect of the proceedings in the trial court. If the action of the trial court involved the merits, then the motion is without foundation.

The petition in this case was not at any time attacked by defendants by motion or demurrer. Answers were filed which pleaded the merits and alleged matters somewhat in the nature of a plea in confession and avoidance. A reply was duly filed denying the allegations of these answers. The cause came on for trial, a jury was impanelled, and opening statements to the jury were made both by counsel for plaintiff and counsel for the defendants. At the conclusion of these opening statements, counsel for the defend-

ants, now the defendants in error, moved the court as follows (Rec., p. 105):

"I now move on the petition *and opening of plaintiff's counsel*, separately, in behalf of each of the defendants, **for a directed verdict** as to each, on the ground that the petition *and opening* fail to state facts sufficient to *constitute a cause of action* arising under the Sherman Act or any Act amendatory thereof."

At the conclusion of arguments upon this motion the court instructed the jury (Rec., p. 106); the material parts of which instruction are as follows:

"I have given the matter consideration and have reached the conclusion that, as a matter of law, *there is nothing that would justify a finding against the defendants here and that it is our duty to return a verdict for the defendants.* * * * The clerk has prepared a form of verdict and I will ask the gentleman on this end to step forward as foreman of the jury and to sign the verdict as the verdict of the jury."

An order upon this motion was entered as follows (Rec., p. 86):

"Ordered, that the motion of defendant *for a directed verdict* be, and the same is hereby, sustained."

The verdict rendered was as follows (Rec., p. 86):

"Verdict for Defendant."

This order was made and verdict received on April 20, 1921. Thereafter, and on November 5, 1921, judgment of dismissal *nunc pro tunc* was entered of record (Rec., p. 117), the material part of which judgment is as follows:

"Wherefore, it is considered and adjudged *nunc pro tunc*, that judgment be and hereby is **entered upon the verdict herein** in favor of the defendant and against the plaintiff, and that this cause be and hereby is dismissed."

The memorandum opinion of the court is found in the record at page 117. It is very lengthy, but parts of it are selected and presented herewith:

"I have reached the conclusion here that the motion should be sustained, and that upon **two grounds**: *first*, that it is not shown with any *sufficient clearness* that the complaint of the plaintiff is one over which this Court has jurisdiction; *second*, the petition does not show with any sufficient clearness or certainty any combination or conspiracy for an illegal purpose or any combining together in concert to use illegal means, sufficient to justify the court in proceeding further with the trial of the case.

"I find the petition to be vague and uncertain * * * and construing the allegations of the petition strongly against the pleader, which I conceive it to be the duty of the Court to do at this stage of the case, *I do not find a case of unlawful conspiracy or combination in restraint of trade* made out on paper, or a state of facts made out on paper, as explained and elaborated by the opening statement of counsel, sufficient to justify the exercise of jurisdiction by the Court.

"* * * That is practically impossible to do on this petition and arrive with any certainty at the exact nature of the plaintiff's claim, nor can you construe his allegations as they should be construed, without *leaving inferences open under which he could not recover*. * * * But how it came to grow up, how it came to be a conspiracy, what *unlawful means* were resorted to, or what *unlawful purposes* were put in force and effect in order to justify a bald conclusion that it did so result or by what kind of combination or conspiracy does not appear in the petition. * * * As to what acts of conspiracy or what acts of criminality were committed in building up that system of exchanges you would have to guess at it entirely from this petition. * * * It discloses an organization whose articles are perfectly legal and perfectly proper * * *. That being so, the general allegation of the petition that it is organized to destroy the plaintiff's business becomes mere surplusage, a conclusion that does not justify the introduction of evidence to support

it. * * * *What is there shown in the petition unlawful about that?* * * * There is no allegation in the petition from which it can be inferred that that was an *unlawful thing* for them to do either singly or in concert, so far as I can see. * * * I do not find any case which presents an analogy to support this kind of a claim. * * * It does sufficiently appear in the petition that the various members of this exchange and other manufacturers and producers of motion picture films were competing with each other."

The case was carried to the Circuit Court of Appeals for the Eighth Circuit where Judge Treiber, District Judge, delivered the opinion of the Court (Rec., p. 152), saying:

"The court (trial court) as stated in a memorandum opinion, sustained the motion for a directed verdict *upon two grounds*. First, that 'the petition, as amended, does not show with sufficient clearness that the court has jurisdiction' and second that 'it fails to show with sufficient clearness or certainty any combination or conspiracy for an illegal purpose or any combining together in concert to use illegal means, sufficient to justify the court in proceeding further in the trial of the case.'"

Judge Trieber then proceeds to dispose of the appeal upon the jurisdictional issue only, stating:

"As the jurisdiction of the court is *one* of the grounds upon which the court directed a verdict, it must be disposed of first. * * *"

Defendants in error appeared in the Circuit Court of Appeals for the Eighth Circuit with the same motion now presented to the Supreme Court of the United States. That motion was denied, Judge Sanborn delivering the ruling of the court.

ARGUMENT

The practical construction of the procedural point involved upon this motion as shown by decisions in cases arising under the Sherman Anti-Trust Act is contrary to the constitution urged by Defendants in Error.

However interesting it may be to follow counsel for Defendants in Error into a technical and theoretical discussion of the effect of the Circuit Court of Appeals Act of 1891, it is submitted that such investigation is unnecessary in view of the fact that the practical application of that statute is to the contrary of all of the contentions made in support of this motion.

Since its passage in 1891, the Circuit Court of Appeals Act has not been amended in any respect which affects the question arising upon this motion. Defendants in Error in their argument cite many decisions arising in admiralty, bankruptcy matters, etc., but do not cite a single case arising under the Sherman Anti-Trust Act. Plaintiff in Error will now cite many cases arising under the Sherman Anti-Trust Act, where the course of appeal has been from the District or Circuit Courts to the Circuit Court of Appeals and thence to the Supreme Court of the United States. These cases have involved the following situations: (1) Both actions by the United States for an injunction and *actions by private parties for treble damages*; (2) dismissal of the bill or petition upon demurrer; (3) orders dismissing the petition after issue was joined upon the pleadings and the case submitted upon affidavits; (4) judgments on verdicts for the plaintiff; (5) *instructed verdicts for defendants*; (6) judgments on verdicts for the plaintiff; (7) judgments on verdicts in favor of defendants; (8) injunction granted; (9) injunction denied.

The case of *United States v. E. C. Knight Company* (1895), resulted in a *decree for defendant* in the Pennsylvania District Court, was affirmed by the Third Circuit

Court of Appeals (60 Fed. 934), and affirmed by the Supreme Court of the United States (15 S. C. R. 249).

The case of *United States v. Trans-Missouri Freight Association* (1897), was dismissed upon the pleadings only by the District Court (53 Fed. 440), affirmed by the Eighth Circuit Court of Appeals (58 Fed. 58), and appealed to the Supreme Court of the United States (17 S. C. R. 540), where the jurisdiction of the latter Court was challenged on the jurisdictional issue under the Act of 1891, and the contention decided adversely to the contention of the defendants in error in the case at bar.

In the case of *Hopkins v. United States* (1898), the case was submitted upon the pleadings and affidavits, and an injunction granted by the trial court (82 Fed. 529), and the case was carried upon appeal to the Eighth Circuit Court of Appeals which certified certain questions to the Supreme Court of the United States, which latter court issued its writ of certiorari, bringing up the whole case, and reversed the decision (171 U. S. 578; 19 S. C. R. 40).

In the case of *Addyston Pipe Company v. United States* (1899) the petition was dismissed by the trial court upon demurrer (78 Fed. 712) and appealed to the Sixth Circuit Court of Appeals, which, through an opinion by Judge Taft, reversed the decision (85 Fed. 271). The case was then submitted to the trial court upon affidavits and an appeal then taken to the Supreme Court of the United States (175 U. S. 211; 20 S. C. R. 96; 44 L. Ed. 136).

In the case of *Montague v. Lowry* (1904), which was an action for treble damages, judgment was entered in the trial court upon a verdict for plaintiff (106 Fed. 38), and affirmed by the Ninth Circuit Court of Appeals (115 Fed. 27), and affirmed by the Supreme Court of the United States in error proceedings (193 U. S. 38; 24 S. C. R. 307; 48 L. Ed. 608).

In the case of *Board of Trade v. Grain Company* (1905), two appeals were involved. In the first one the District Court of Missouri granted an injunction, and upon appeal the Eighth Circuit Court of Appeals denied it (125 Fed. 161); and in the second case the District Court of Indiana dismissed the bill and the Seventh Circuit Court of Appeals reversed that decision (130 Fed. 507). Both cases were reviewed by the Supreme Court of the United States upon writ of certiorari (25 S. C. R. 637).

In the case of *Loewe v. Lawlor* (1907), which was an action for treble damages, the trial court sustained a demurrer to the petition (148 Fed. 924; see also 142 Fed. 216, and 130 Fed. 633), on the ground "that the combination stated was not within the Sherman Act, and this rendered it unnecessary to pass upon any other question in the case." Error was taken to the Second Circuit Court of Appeals, which certified the question to the Supreme Court of the United States, which brought the whole case up upon writ of certiorari and reversed the decision (208 U. S. 274; 28 S. C. R. 301; 52 L. Ed. 488).

In the case of *American Banana Company v. United Fruit Company* (1909) which was an action for treble damages, the District Court dismissed the complaint as not stating a cause of action (160 Fed. 184), which was affirmed by the Second Circuit Court of Appeals (166 Fed. 261), and which was affirmed by the Supreme Court of the United States in error proceedings (29 S. C. R. 511).

In the case of *Dr. Miles Medical Company v. Park & Sons* 1911), which was a bill for an injunction and an accounting, the District Court of Kentucky dismissed the bill on demurrer, which was affirmed by the Sixth Circuit Court of Appeals, and the case was carried to the Supreme Court of the United States by a writ of certiorari, and affirmed (220 U. S. 373; 31 S. C. R. 376).

In the case of *Virtue v. Creamery Co.* (1913), which was an action for three-fold damages, the petition and answer had been filed and a jury impanelled, at which time *the court instructed a verdict for defendants—exactly as in the case at bar.* The judgment on the verdict was affirmed by the Eighth Circuit (179 Fed. 115) and the case was carried to the Supreme Court of the United States in error proceedings and affirmed (227 U. S. 8; 33 S. C. R. 202).

In the case of *Lawlor v. Loewe* (1915), which was an action for treble damages, *judgment was entered on a verdict in favor of plaintiff*, and the case was carried to the Second Circuit Court of Appeals, where the judgment was affirmed (209 Fed. 721), and the decision there was affirmed by the Supreme Court of the United States (235 U. S. 522; 35 S. C. R. 170).

In the case of *Fleitmann v. Wellsbach Company* (1916), which was an action for three-fold damages, the *petition was dismissed* by the District Court and this action was affirmed by the Second Circuit Court of Appeals (211 Fed. 103) and was affirmed by the Supreme Court of the United States (240 U. S. 27; 36 S. C. R. 233).

In the case of *Thomsen v. Cayser* (1917), which was an action for treble damages, the case was *dismicssed by the District Court at the conclusion of the evidence upon the ground that no cause of action had been established*, the court finding that the combination was "not in unreasonable restraint of trade" (149 Fed. 933). The action of the trial court was reversed by the Second Circuit Court of Appeals (166 Fed. 251), and upon re-trial judgment was entered upon the *verdict in favor of plaintiff*. This latter judgment was reversed in the Circuit Court of Appeals (190 Fed. 536), and was returned with instructions to dismiss upon the ground that no cause of action was shown. The case was taken in error proceedings to the Supreme Court of the United States, which reversed the Circuit Court of Appeals and

held that the judgment entered in the trial court was correct (243 U. S. 66; 37 S. C. R. 353).

In the case of *Paine Lumber Company v. Neal* (1917), a bill for an injunction was dismissed by the District Court on the ground that no special damage was shown (212 Fed. 259), which was affirmed by the Second Circuit Court of Appeals (214 Fed. 82) upon the same ground, and the case was then carried to the Supreme Court of the United States (244 U. S. 459).

In the case of *Boston Store v. Graphophone Company* (1918), the trial court granted an injunction under the Sherman Act (225 Fed. 785), and the case was carried to the Seventh Circuit Court of Appeals, which certified the questions to the Supreme Court of the United States, which latter court said (246 U. S. 8; 38 S. C. R. 257):

“Assuming that the bill to enforce a price-maintenance contract asserted rights under the patent law, a Federal District Court *had jurisdiction* to determine whether the suit arose under such law.”

In the case of *Buckeye Powder Company v. Dupont* (1918), which is an action for treble damages, there was a verdict by the jury in favor of one defendant and an instructed verdict in favor of the other defendants. The case was carried to the Third Circuit Court of Appeals, which affirmed the judgments (223 Fed. 881) and thence carried in error proceeding to the Supreme Court of the United States, and affirmed (248 U. S. 55; 39 S. C. R. 38).

In the case of *Duplex Printing Company v. Deering* (1920), the trial court dismissed a bill for an injunction with a prayer for damages (247 Fed. 192), which action was affirmed by the Second Circuit Court of Appeals (252 Fed. 722), and then reversed by the Supreme Court of the United States (254 U. S. 443; 41 S. C. R. 172).

In the case of *Ramsay v. Bill Posters* (1923), which was an action for treble damages, the trial court dismissed the

petition upon demurrer upon the ground that no cause of action was stated. This action was affirmed by the Second Circuit Court of Appeals (271 Fed. 140), and the case carried to the Supreme Court of the United States in error proceedings and reversed (43 S. C. R. 167).

To the foregoing decisions in the Supreme Court of the United States are added the following, merely as representative of the attitude of the Circuit Court of Appeals:

In *Whitewell v. Continental Tobacco Company*, 125 Fed. 454 (8 C.C.A.) the court reviewed the action of the trial court in sustaining a demurrer to the complaint.

In the case of *Dowd v. United Mine Workers*, 235 Fed. 1 (8 C.C.A.), the Circuit Court of Appeals reviewed the action of the trial court in sustaining the demurrer to the petition. This is an especially instructive case.

In the case of *United Copper Securities Company v. Amalgamated Copper Company*, 232 Fed. 574 (2 C.C.A.), the Circuit Court of Appeals reviewed a judgment dismissing the complaint.

In the case of *Meeker v. Lehigh Valley R. R.*, 183 Fed. 548 (2nd C.C.A.), the court reviewed a dismissal of the complaint for failure to state a cause of action.

In the case of *Hale v. Hatch*, 204 Fed. 433, and *Atlanta v. Chattanooga Foundry*, 127 Fed. 23, the Circuit Court of Appeals has reviewed actions wherein a verdict for defendants was instructed by the court at the close of the case.

Summary of Preceding Cases

The cases above include ten actions for treble damages, all of which went to the Circuit Court of Appeals and from there to the Supreme Court. In four cases demurrers were sustained; in one the petition was dismissed at the close of

the evidence; in two the court instructed a verdict for defendants; in one there was a jury verdict for defendant, and in three a jury verdict for plaintiff. In addition there are five cases involving bills for injunction by private parties, four involving bills for injunction by the government, and also five cases from Circuit Courts of Appeals, selected at random. The total is twenty-eight cases.

It will not do to say that the effect of the Act of 1891 was not made an issue in these cases. This court has frequently said that jurisdiction cannot be conferred by consent, and that it is the duty of the court to itself raise any jurisdictional point which may be involved in the case. Further—*United States v. Trans-Missouri Freight Association*, 17 S. C. R. 140; *Dowd v. Mine Workers*, 235 Fed. 1; *Meeker v. Lehigh Valley R. R.*, 183 Fed. 548.

Meaning of the phrase, "The Jurisdiction of the Court as a Federal Court."

The word "jurisdiction" as used in the Act of 1891, and the part thereof now in controversy, is limited to the question of the power of the court to hear the cause *in order to determine* whether or not a statute of the United States has been violated. It does not, in any sense of the word, depend on whether or not an actual violation of the statute is established. The proposition upon which the argument of defendants in error is based would, if true, result in the situation that if the trial court proceeded to hear the evidence and at the conclusion thereof either directed a verdict, or received a verdict from the jury, which involved a finding that the laws of the United States had not been violated, then the entire proceeding would be disclosed to have been without jurisdiction from the beginning and the verdict and judgment thereon would be void. The same proposition would necessarily result in requiring the Supreme Court to hear all suits or actions based upon the Sherman Act in which the trial court found no violation of the statute or

no right to recover damages therefor. The burden thus placed upon the Court would be considerable, and, on the other hand, the Circuit Court of Appeals would be relieved of a jurisdiction which it has heretofore exercised most generously in cases of this kind.

In a case arising under the Sherman Anti-Trust Act it is the conception of the plaintiff in error that the question of jurisdiction is determined solely by the answer to the inquiry as to whether or not the plaintiff in any but a frivolous way shows that the case involves interstate commerce. If the trial court should reach the conclusion that although the allegations as to interstate commerce were not frivolous or groundless, they were yet in his opinion, after a careful review of the authorities, not sufficient to convince him that the case involved a restraint upon interstate commerce, then in that event the trial court would be ruling upon the merits of the case.

Wieland v. Irrigation Co., 42 S. C. R. 568.

Whether or not this position is correct, it must at least be conceded that where the trial court determines that no concert existed among the defendants, that no illegal means or illegal purpose was involved, or that no special damage to the plaintiff, as distinguished from the general public was involved, then the trial court has taken into consideration the merits of the particular case and determined them. The decision of such questions does not involve the right of the court to hear and determine the controversy, but involves an actual determination of the controversy itself.

United States v. Brown, 281 Fed. 657 (8th C. C. A.)

An instructed verdict and judgment is absolutely an assumption of jurisdiction. The trial court in the case at bar could not have taken the action which he did except upon the theory that he had jurisdiction to determine the cause. Otherwise the verdict and judgment entered in the trial court in the case at bar are absolutely void. This is the rock upon which the argument of defendants is shattered.

In the case of *Lamar v. United States*, 240 U. S. 140, 60 L. Ed. 526; 60 Sup. Ct. Rep. 66, plaintiff in error had been convicted of violating a statute of the United States. A writ of error was taken to the Supreme Court of the United States, but was dismissed by that court in an opinion in which it is said:

"On the matter of jurisdiction it is said that when the controversy concerns a subject limited by federal law, such as bankruptcy, copyright, patents, or admiralty, the jurisdiction so far coalesces with the merits that a case not within the law is not within the jurisdiction of the court." (Citing many of the cases relied upon by defendants in the case at bar). "Jurisdiction is a matter of power, and covers wrong, as well as right, decisions. There may be instances in which it is hard to say whether the law goes to the power or only to the duty of the court, *but the argument is pressed too far*. A decision that a patent is bad, either on the facts or on the law, is as binding as one that it is good. And nothing can be clearer than that the District Court, which has jurisdiction of all the crimes cognizable under authority of the United States, acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. The objection that the indictment does not charge a crime against the United States goes only to the merits of the case."

In the case of *Louie v. The United States*, decided by the Supreme Court of the United States in January, 1921, an Indian had been convicted of crime under the laws of the United States and judgment was entered notwithstanding his motions to dismiss for want of jurisdiction, on the

ground that the crime had been committed beyond the tribal reservation. Appeal was taken to the Circuit Court of Appeals of the Ninth Circuit, which dismissed the writ of error on the ground that the sole question presented was whether the District Court had jurisdiction and that the right of appeal was confined to a direct writ of error from the Supreme Court of the United States to the District Court within the rules laid down in the case of *United States v. Jahn*, 155 U. S. 109. In reversing the judgment of the Circuit Court of Appeals, the opinion states:

"The motions made by defendants in the District Court raised a question, not of the jurisdiction of that court, but of the jurisdiction of the United States. The contention was, in essence, that, by reason of the facts set forth in the motions the defendant was, in respect to the acts complained of, subject to the laws of the State of Idaho and not to the laws of the United States. In other words, that he did not violate the laws of the United States. * * * The defendant in effect denied that that killing was, in the statutory sense, within the reservation. If this was true, an essential element of a crime against the United States was lacking. * * * Since defendant's motion in the District Court did not raise a question properly of the jurisdiction of the court, but went to the merits, there was no basis for a direct writ of error from this court." (Pronovost v. The United States, 232 U. S. 487; 58 L. Ed. 696; 34 Sup. Ct. Rep. 391.) He properly sought review in the Circuit Court of Appeals.

To the same effect is the more recent case of *Pothier v. Rodman*, 43 S. C. R. 374 (1923).

In the case of *Smith v. McKay*, 16 Sup. Ct. Rep. 490, the Supreme Court said:

"The appellants contended that the United States had not, by their bill, made a case properly cognizable in a court of equity. The objection was the want of equity, not the want of power. The jurisdiction of the Circuit Court, therefore, was not in issue within the intent and meaning of the act. * * * The objection was not to the

want of power in the Circuit Court to entertain the suit * * * but to the want of equity in the complainant's bill. The appellant's contention in this respect would require us to entertain an appeal from the Circuit Court in every case in equity in which the defendants should choose to file a demurrer to the bill on the ground that there was a remedy under the law."

Other authorities similarly defining the word "jurisdiction" are as follows:

United States v. Brown, 281 Fed. 657 (8th C. C. A.)
Illinois Central Ry. v. Adams, 21 Sup. Ct. Rep. 251.
Ex parte Watkins, 32 U. S. 568.
U. S. v. Larkin, 208 U. S. 450.
Rosenbaum v. Bauer, 120 U. S. 450.
Reynolds v. Stockton, 140 U. S. 254.
Venner v. Railway, 209 U. S. 24.
Courtney v. Pratt, 196 U. S. 89.
Bache v. Hunt, 193 U. S. 525.
Louisville Trust Company v. Knott, 191 U. S. 225.
Blythe v. Hinkley, 173 U. S. 501.
Davis v. Railway, 217 U. S. 157.

In the case at bar the motion upon which the court acted did not challenge the jurisdiction of the court, but challenged the merits of the case, and the form of the decree, being a directed verdict and a general judgment thereon, clearly shows an action based upon the merits of the case. Although the court in his opinion expressed his doubts on the subject of jurisdiction, he very carefully refrained from basing his conclusion upon that ground, nor was it required of him that he do so, in view of the character of the motion upon which he was required to rule. This court has held that where there is any conflict between the opinion of the trial court and the form of the decree entered in that court, the form of the decree must control. It is the decree from which this appeal is taken—not the opinion of the court—and the rights of plaintiff in error do not depend one way or the other upon the correctness of the reasons given by the trial judge for his course.

The Ira M. Hedges, 218 U. S. 264.

It has been held repeatedly that a general dismissal of an action is *res adjudicata* of all the questions involved in the case, and this is the rule in the State of Nebraska, in which State this case arose.

Thompson v. Missouri Pacific Railway, 51 Neb. 527.

It has also been held repeatedly that to limit the effect of the dismissal to the question of jurisdiction alone, the jurisdiction must be specifically challenged and the order must specifically state that the action is dismissed for want of jurisdiction. However, in the case at bar there was no challenge specifically to the jurisdiction, and no dismissal upon the ground of jurisdiction, but a general verdict and judgment in favor of the defendants, which, of course, was *res adjudicata* against the plaintiff as to all the elements of his action.

Indian v. Shoenfelt, 135 Fed. 484 8 C.C.A. 1905).

Fowler v. Osgood, 141 Fed. 20 (8 C.C.A. 1905).

Campbell v. Golden Mining Company, 141 Fed. 610 (8 C.C.A. 1905).

Maxwell v. Federal Gold Company, 155 Fed. 110 (8 C.C.A. 1907).

Morrisdale Coal Company v. Pennsylvania R. R., 183 Fed. 929.

Greata Northern Ry. v. Blaine County, Neb., et al, 252 Fed. 548 (8 C.C.A. 1918).

Turk v. Illinois Central R. Co., 218 Fed. 315 (6 C.C.A. 1914).

Cobb v. Sertic, 218 Fed. 320 (6 C.C.A. 1914).

It is also well established that the issue as to whether or not a petition states facts sufficient to constitute a cause of action under an Act of Congress is an issue, not upon the jurisdiction, but upon the merits of the case.

The Farrugia, 34 Sup. Ct. Rep. 591.

Darnell v. Illinois Central Ry., 225 U. S. 243; 32 S. C. R. 760.

United States v. Brown, 281 Fed. 657 (8th C. C. A.)

Crabtree v. Madden, 54 Fed. 426.

National Pole Company v. C. & N. W. Ry., 211 Fed. 65.
De Rees v. Costaguta, 254 U. S. 166.
Smith v. McKay, 161 U. S. 355.
Illinois Central Ry. v. Adams, 180 U. S. 28.
Louisville & Nashville Ry. v. Western Union Telegraph Co., 234 U. S. 369.
Public Service Co. v. Corboy, 250 U. S. 153.

Defendants in Error concede this to be the general rule, but argue that it is not applicable to cases arising under Federal statutes. To sustain this proposition they quote general language from opinions without having the frankness to disclose that in each case the motion acted upon specifically challenged the jurisdiction, and that alone. The cases cited above by plaintiff all arose under Federal statutes, yet the rule stated was uniformly applied.

The case of *Meeker v. Lehigh Valley R. R.* (183 Fed. 548), was an action for treble damages under the Sherman Act which was dismissed upon demurrer as not stating facts sufficient to constitute a cause of action. The Circuit Court of Appeals for the Second Circuit specifically passed upon the exact issue raised upon this motion in the case at bar and sustained its jurisdiction, saying:

"The demurrer, however, was sustained upon the ground that the complaint failed to state a cause of action, not because the court had no jurisdiction."

The same issue was decided in the same way in another action for treble damages under the Sherman Act in the case of *Dowd v. United Mine Workers*, 235 Fed. 1 (8 C.C.A.).

Defendants' theory is that the two considerations of jurisdiction and the merits coalesce in a case based upon a Federal statute. If so, by what right do defendants absorb the question on the merits into the question on the jurisdiction? May it not be contended with equal reason that the question on the jurisdiction is absorbed into the question on the merits? The court of the Seventh Circuit answered this

dilemma as follows (*National Pole Co. v. Chicago & North Western R. R.*, 211 Fed. 65, 67):

"If the two considerations coalesce, if all the substance is run into one mould, still the aspects of the obverse and reverse faces are from as separate points of view as if the faces were on separate castings. And if the judgment, and the assignments of error, actually present both aspects, this court has appellate jurisdiction."

The same contention was answered by the Supreme Court of the United States in the case of *Lamar v. United States*, 240 U. S. 140, when the court said: "the argument is pressed too far."

If the two considerations coalesce, it is necessary for the party seeking action upon one of them to *effect a separation* of the two by a motion specifically directed at the jurisdiction..

Defendants seek to emphasize their contention in this respect by the proposition that the failure to state a "*substantial*" cause of action is a jurisdictional defect. This might be true if the court expressly finds the allegation to be *frivolous*, but cannot be true generally. Every dismissal for failure to state a cause of action is necessarily based upon the conclusion that the petition does not state a *substantial* cause of action. The same is true of a dismissal at the close of the evidence and also a directed verdict for defendant. *If the complaint is not frivolous, the court has jurisdiction to determine whether it is substantial.*

Wieland v. Pioneer Irrigation Co., 42 S. C. R. 568.

Plaintiff has presented above many cases under the Sherman Act where the action has been dismissed and yet the decision has been reviewed both by the Circuit Court of Appeals and the Supreme Court of the United States. A practical construction of the point herein involved, extend-

ing over the entire period since the passage both of the Sherman Act and the Circuit Court of Appeals Act, being a period of over thirty years, is certainly misleading to the bar and litigants unless it affords secure protection against fine-spun theories at this late date.

The single case cited by Defendants which lends the slightest color to their present contentions is that of *Blumensstock v. Curtis Publishing Co.*, 252 U. S. 436, 40 S. C. R. 385, which states that a substantial case of interstate commerce is essential to the jurisdiction. Yet that very issue was involved in the case of *Ramsay v. Associated Bill Posters*, 43 S. C. R. 167, which went through the Circuit Court of Appeals to the Supreme Court four years later. The *Blumensstock* case is easily explained by the fact that the defendant never submitted to the jurisdiction of the court, but filed a special appearance and moved to dismiss for want of jurisdiction either of the defendant or the subject matter, and the dismissal by the court was based upon that specific ground. No procedural issue was involved or discussed, for the reason that the plaintiff had a clear right to appeal direct to the Supreme Court if he so desired.

The Authorities Relied upon by Defendants in Error

The quotation of defendants in error from the case of *United States v. Jahn*, 155 U. S. 109 (114) is not complete. A complete reading of the opinion shows that it seeks to divide those cases in which the only question raised was jurisdiction so that the appeal could be only direct to the Supreme Court of the United States, and those cases in which a question upon the merits was also involved, and in which either party could *elect* whether to take the case to the Supreme Court of the United States on the question of jurisdiction alone, waiving the merits, or take the case to the Circuit Court of Appeals on both the merits and the jurisdiction. The case would be in point only if the actual decree in the case at bar had involved solely the jurisdic

tional question and decided it adversely to plaintiff, which is not the case.

In the case of *Steamship Jefferson*, 215 U. S. 130, the action was dismissed by the trial court *on the specific ground of want of jurisdiction* in response to a motion specifically raising that issue, and the Supreme Court of the United States takes particular pains to point out that it was *not dismissed for failure to state a cause of action*. The case of *De Rees v. Costaguta* is similar, as are also the cases of *The Pesaro*, 255 U. S. 216; *The Ira Hedges*, 218 U. S. 264, the cases of *Webber v. Freed*, 239 U. S. 325, and the cases of *Mitchell Coal Co. v. Pennsylvania R. R.*, and *Blumenstock v. Curtis Publishing Co.*, Therefore the authorities relied upon in support of the motion are not in point under the facts in the case at bar.

ANSWER TO POINT TWO OF ARGUMENT OF DEFENDANTS IN ERROR

This court has jurisdiction to review the decision of the Circuit Court of Appeals.

The plaintiff in error might have brought his case direct to the Supreme Court of the United States from the District Court, provided that he had been willing to waive the issue upon the merits. It cannot be disputed, however, that he had the right to take his case to the Circuit Court of Appeals since the verdict and judgment below involved both the merits and the jurisdiction.

However, defendants in error contend that this court cannot review the decision of the Circuit Court of Appeals, and support this argument by but one authority, namely, the decision in the case of *Ohio ex rel Seney v. Swift & Company*, Adv. Op. December 1, 1922, page 31; 43 S. C. R. 22. The only rule laid down in this case is that if a party carries his case to the Circuit Court of Appeals and there litigates the single question of jurisdiction and waives all contention

upon the merits of the case, he will not then be permitted to come to the Supreme Court of the United States and raise the questions which he waived in the Circuit Court of Appeals. The plaintiff had appeared in the trial court and moved to remand to the State Court an action which was based upon the Anti-Trust Law of the State of Ohio. Upon this motion being overruled the plaintiff refused to litigate the merits, and although the trial court dismissed the complaint and based its conclusion in part upon the findings of an adequate affirmative defense, the plaintiff appeared in the Circuit Court of Appeals urging the jurisdictional question alone, as appears from the following language in the opinion of the Supreme Court:

"After final judgment in the District Court, other defenses being waived, the cause might have gone either by direct appeal upon the jurisdictional question alone; but other matters were involved which could have been reviewed. He (the plaintiff) chose to go to the Circuit Court of Appeals, and there assail the removal and nothing more. * * * Generally, at least, suitors may not maintain a position here which conflicts with that taken below."

In the case at bar both the issue on the jurisdiction and that on the merits were presented to the Circuit Court of Appeals. There was no waiver. This is shown by the assignments of error, by the ruling of the Circuit Court of Appeals on the motion to dismiss and by the opinion in that court. Defendant in Error filed a brief in the Circuit court of Appeals consisting of one hundred and forty-eight pages of argument, of which one hundred and thirty-three pages were devoted to the merits and only fifteen to the question of interstate commerce.

The second proposition of defendants' brief needs no further comment.

CONCLUSION

It is submitted that this motion is vexations. Can a trial court, by refusing to base its decision upon any single ground, place litigants in a situation where at their peril they must select one ground only as being the real basis of its decision? Can the defendants plead to the merits and seek and obtain a directed verdict upon general grounds, and then be heard before this court urging a refusal to review on the ground that the general judgment for defendants did not involve the merits of this case? Can counsel be heard to argue technical and almost fanciful theories contrary to an established course of procedure in the same class of cases for the last thirty years? If the answers to such questions are in the negative, as plaintiff submits, they should be, then this motion should be denied.

Respectfully submitted,

C. P. ANDERBERY,
NORRIS BROWN,
IRVING F. BAXTER,
DANA B. VANDUSEN,

Counsel for Plaintiff in Error.

ADDENDA

Since the above reached the printer, counsel have observed the Act of September 14th, 1922 (ch. 305, 42 Stat. L. 837, Fed. Stat. Ann., 1922 Supp., pg. 231), which amends section 238 of the Judicial Code. It appears that the object of this Act is to protect litigants from the very uncertainties which are made the ground of defendant's motion. By virtue of this Act the motion of defendants becomes groundless.

THE HISTORY OF

THE CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
IN TWO VOLUMES
BY NATHANIEL BENTLEY
VOLUME I
FROM THE FIRST SETTLEMENT
TO THE YEAR 1700
PUBLISHED BY J. B. BENTLEY
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WM. H. STANSBURY
CLERK

Supreme Court of the United States

October Term, 1922

No. 438- 77

CHARLES G. BINDERUP, *Plaintiff-in-Error*,
against
PATHE EXCHANGE, INC., *et al.*, *Defendants-in-Error*.

Notice, Motion to Dismiss and Brief of the Defendants-in-Error in Support of Motion to Dismiss.

WILLIAM MARSTON SEABURY,
of New York, N. Y.,
Attorney for Defendants-in-Error.

CHARLES B. SAMUELS, Esq.,
Of Counsel for Pathe Exchange, Inc.

ERIK JOHN LUDVIG, Esq.,
Of Counsel for Famous Players Lasky Corporation.

B. F. JACOBS, Esq.,
Of Counsel for First National Exhibitors Circuit, Inc.

SAUL E. ROGERS, Esq.,
Of Counsel for Fox Film Corporation.

WILLIAM MARSTON SEABURY, Esq.,
Of Counsel for Vitagraph, Inc.

KARL W. KIRCHWEY, Esq.,
Of Counsel for Select Pictures Corporation.

GABRIEL HENS, Esq.,
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SIGMUND F. HARTMAN, Esq.,
Of Counsel for Universal Film Manufacturing Company.

OSCAR M. BATE, Esq.,
Of Counsel for W. W. Hodgkinson Corporation.

J. ROBERT RUBIN, Esq.,
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JOHN J. SULLIVAN, Esq.,
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Omaha, Nebraska,
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EUGENE N. BLAKER, Esq.,
Omaha, Nebraska,
Of Counsel for Omaha Film Board of Trade.

INGLS, INC., 165 William Street, New York City



Notice of Motion to Dismiss Writ of Error
Supreme Court of the United States
October Term, 1922

CHARLES J. BINDERUP,
Plaintiff-in-Error,

against

PATHE EXCHANGE, INC., *et al.*,
Defendants-in-Error.

DOCKET NO. 478

Gentlemen:

PLEASE TAKE NOTICE that the annexed motion to dismiss will be presented to the Court at the City of Washington, District of Columbia, on the 14th day of May, 1923, at the opening of Court on that day, or as soon thereafter as counsel may be heard.

Dated, New York, N. Y., April 14, 1923.

Yours, etc.,

WILLIAM MARSTON SEABURY,
Attorney for Defendants-in-Error,
Bar Building,
New York City.

To:

MESSRS. BROWN, BAXTER & VAN DUSEN.
C. P. ANDERREBY, Esq.

**Motion to Dismiss Writ of Error for Want of
Jurisdiction.**

SUPREME COURT OF THE UNITED STATES

CHARLES J. BINDERUP,
Plaintiff-in-Error,

against

PATHE EXCHANGE, INC., et al.,
Defendants-in-Error.

DOCKET NO. 478

Come now the defendants-in-error herein and severally move this Honorable Court to dismiss the writ of error herein upon the ground that this Court is without jurisdiction thereof for the reasons hereinafter stated.

Respectfully submitted,

WILLIAM MARSTON SEABURY,
Attorney for Defendants-in-Error,
Bar Building,
New York City.

Supreme Court of the United States

CHARLES J. BINDERUP,
Plaintiff-in-Error,

against

PATHE EXCHANGE, INC., *et al.*,
Defendants-in-Error.

DOCKET NO. 478

BRIEF OF THE DEFENDANTS-IN-ERROR IN SUPPORT OF MOTION TO DISMISS.

The plaintiff-in-error brought suit in the District Court of the United States for the District of Nebraska in the Omaha Division under Section 7 of the Act of July 2, 1890, known as the Sherman Act for alleged violations of Section 1 of that Act.

The jurisdiction of the District Court rested solely upon the claim that the controversy was one which arose under the Act in question, and since many of the defendants were citizens of the State of Nebraska, of which State plaintiff also was a citizen, there was no other ground of Federal jurisdiction.

After plaintiff's counsel had opened the case to the jury the defendants' counsel moved for a directed verdict upon the ground that the plaintiff had failed to allege in his petition facts sufficient to constitute a cause of action under the Sherman Act or any act amendatory thereof.

After three days' of argument the learned District Judge granted the motion as appears from the Court's opinion (R., 117-122) solely upon the ground that the District Court had no jurisdiction over the controversy because it was not one which affected or involved interstate commerce.

Thereafter judgment in favor of the defendants dismissing the plaintiff's petition was entered (R., 117).

Instead of taking his case directly to this Court under Judicial Code Section 238, the plaintiff took his case by writ of error to the Circuit Court of Appeals for the Eighth Circuit, and although the defendants-in-error duly moved that Court to dismiss the writ of error for want of jurisdiction (R., 149-150), that learned Court denied the motion to dismiss (R., 151) heard the cause as though upon its merits and in due course affirmed the judgment of the District Court solely upon the ground that the District Court had correctly decided that it was without jurisdiction over the controversy (R., 158).

Judge SANBORN dissented from this judgment (R., 158-160) and later allowed a writ of error to enable the plaintiff to review here the judgment of the Circuit Court of Appeals as well as the judgment of the District Court.

The plaintiff also applied to this Court for certiorari, which on October 16, 1922, was denied (U. S. Adv. Ops., 1922-23, p. 85).

The defendants-in-error now move to dismiss for want of jurisdiction.

POINT I.

The judgment of the District Court was reviewable only under Judicial Code, Section 238.

Judicial Code, Section 128 (Note 1), which was derived from Section 6 of the Act of March 3, 1891, expressly declares that the Circuit Court of Appeals shall exercise appellate jurisdiction to review the final decisions of the District Courts "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court as provided in Section 238 * * *."

NOTE 1. Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in Section Two Hundred and Thirty-eight, unless otherwise provided by law; and, except as provided in Sections Two Hundred and Thirty-nine and Two Hundred and Forty, the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the Patent Laws, under the Trademark Laws, under the Copyright Laws, under the Revenue Laws, and under the Criminal Laws, and in admiralty cases.

Judicial Code, Section 238 (Note 2), which was derived from Section 5 of the Act of March 3, 1891, authorizes appeals and writs of error to be taken from the District Court direct to the Supreme Court in the following cases: "In any case in which the jurisdiction of the Court is in issue * * *."

In discussing the apportionment of appellate jurisdiction between these two courts, this Court in *United States v. Jahn*, 155 U. S., 109, 114, said:

"(1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this Court. (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it. (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this Court, or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court. (4) If in the case last supposed the plaintiff has ground of complaint in respect of the

NOTE 2. Sec. 238. Appeals and writs of error may be taken from the district courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of cross-appeal or writ of error, if the defendant has taken the case there, or independently, if the defendant has carried the case to this Court on the question of jurisdiction alone, and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits."

Under the rules announced in the *Jahn* case it will be observed that the only instances in which a litigant has an election either to go directly to this Court and review the jurisdictional question alone, or to go first to the Circuit Court of Appeals on the merits, including the jurisdictional issue, and thereafter, in a proper case, to this Court invariably arise in cases in which the District Court *sustained* its own jurisdiction and therefore was in a position to decide other issues which might be reviewed in the Circuit Court of Appeals.

This is appropriately illustrated by *Boston & Maine R. R. v. Gokey*, 210 U. S., 155, 161; *Wilson v. Republic Iron & Steel Co.*, 257 U. S., 92, 96, in each of which cases the District Court *sustained* its own jurisdiction.

In the case at bar where the judgment of the District Court *denied* its own jurisdiction it is entirely clear that even if the District Court after deciding that it was without power to proceed had assumed to determine other independent questions incidental to the merits of the controversy described in the complaint, this Court alone would have had jurisdiction to review the case because when a court holds that it is without power to proceed it is unable thereafter to determine any other issue involved in the controversy (R., 158).

True, the judgment of the District Court does not specify the grounds of dismissal but the opinion of the District Court, to which reference may be made for the purpose of ascertaining the grounds of the decision (*Loeb v. Columbia Township Trustee*, 179 U. S., 472, 482, 483), clearly states them (R., 117-121).

It is of course well settled that the question of jurisdiction which is reviewable directly in the Supreme Court under this Section must be one which involves the jurisdiction of the District Court as a Federal Court, and it has been said that "the question of the adequacy of the allegations of the bill to justify the relief sought does not present a jurisdictional question within the meaning of Judicial Code, Section 238." (*De Rees v. Costaguta*, 254 U. S., 166, 173.)

But where, as here, the cause is cognizable exclusively by a Federal Court, in which Federal jurisdiction is invoked solely upon the ground that the cause is one arising under a Federal statute, and dismissal results from the failure of the petition in a fundamental respect to state facts sufficient to constitute such a cause of action, that judgment of dismissal denies the existence of jurisdiction in the District Court as a Federal tribunal and presents a strictly jurisdictional issue which is reviewable exclusively in this Court under Judicial Code, Section 238. (*Blumenstock Bros. v. Curtis Pub. Co.*, 252 U. S., 436, 440, 441; *The Steamship Jefferson*, 215 U. S., 130, 138; *The Ira M. Hedges*, 218 U. S., 264, 270; *Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S., 247, 250; *Weber v. Freed*, 239 U. S., 325, 329; *The Pesaro*, 255 U. S., 216, 218; *The Carlo Poma*, 255 U. S., 219, 220.

What was said by Mr. Justice HOLMES in the case of *The Ira M. Hedges*, 218 U. S., 264, 270, disposes of the question.

In that case the District Court had dismissed a libel upon the ground that sitting as a Court of Admiralty it had no jurisdiction, on the facts stated to enforce contribution between the parties.

A direct appeal was taken to this Court.

The Court said:

"The first question is whether this Court has jurisdiction of the appeal. It is said that the dismissal of the libel although expressed to be for want of jurisdiction really is on the merits because payment of a judgment at common law is not a ground for contribution from a joint wrong doer not a party to the suit. There sometimes is difficulty in distinguishing between matters going to the jurisdiction and those determining the merits (*Fauntleroy v. Lum.*, 210 U. S., 230, 235), and no doubt this case presents that difficulty.

"But perhaps it may be said that the two considerations coalesce here. The admiralty has a limited jurisdiction. If there are no merits in the claim it is of a kind that the admiralty not only ought not to enforce but has no power to enforce. At all events, the form of decree must be taken to express the meaning of the Judge. If the decree was founded as it purports to be on a denial of jurisdiction in the court, this court has jurisdiction of the appeal. For all admiralty jurisdiction belongs to courts of the United States as such and therefor the denial of jurisdiction brings the appeal within the established rule. See *The Steamship Jefferson*, 215 U. S., 130, 138."

In *Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S., 247, 250, after pointing out that the plaintiff's cause of action was one which was cognizable only in a Federal Court, this Court said:

"The motion to dismiss challenged the jurisdiction of the Court as a Federal Court and its power 'primarily to hear complaints concerning wrongs of the character of the one here complained of' * * *. The order of dismissal was founded on the

denial of jurisdiction and this court has power to review that ruling. *The Ira M. Hedges*, 218 U. S., 264, 271; *The Steamship Jefferson*, 215 U. S., 130. The case differs from *Darnell v. Ill. R. R. Co.*, U. S., 243. There the Commission had found that the rate was unreasonable. The demurrer, based on the failure to allege that a reparation order had been made in favor of the plaintiff, did not attack the jurisdiction of the Court as a Federal Court, since the cause of action sought to be enforced was one which, if properly brought, could under the Act of June 18, 1910 (36 Stat., 539, 554, C. 309), have been maintained either in a State or Federal Court."

Blumenstock v. Curtis Pub. Co., 252 U. S., 436, 440, 441, is to the same effect. In that case, referring to an action under Section 7 of the Sherman Act, the Court said:

"The action is wholly statutory, and can only be brought in a District Court of the United States, and it is essential to the jurisdiction of the court in such cases that a substantial cause of action within the statute be set up.

In some cases it is difficult to determine whether a ruling dismissing the complaint involves the merits of the cause of action attempted to be pleaded or only a question of the jurisdiction of the Court. In any case alleged to come within the Federal jurisdiction it is not enough to allege that questions of a Federal character arise in the case, it must plainly appear that the averments attempting to bring the case within Federal jurisdiction are real and substantial. *Newburyport Water Co. v. Newburyport*, 193 U. S., 561, 576.

In cases where, as here, the controversy concerns a subject matter limited by Federal law, for which recovery can be had only in the Federal Courts, the jurisdiction attaches only when the suit presents a substantial claim under an act of Congress. This rule has been applied in bankruptcy. (*Grant Shoe Co. v. Laird Co.*, 212 U. S., 445) in copyright cases; (*Globe Newspaper Co. v.*

Walker, 210 U. S., 356), in patent cases; (*Healy v. Sea Gull Specialty Co.*, 237 U. S., 479), in admiralty cases; (*The Jefferson*, 215 U. S., 130)."

Nor is there anything contrary to our contention in *Lamar v. United States*, 240 U. S., 60, 64, or in *Louie v. United States*, 254 U. S., 548, 551. In each case the trial Court sustained its own jurisdiction and defeated the defendant on the merits.

The case at bar is ruled by *The Jefferson*, 215 U. S., 130, 138; *The Ira M. Hedges*, 218 U. S., 264, 271; *Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S., 247, 250; *Weber v. Freed*, 239 U. S., 325, 329; *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U. S., 436, 440, 441; *The Pesaro*, 255 U. S., 216, 218, and *The Carlo Poma*, 255 U. S., 219, 221.

Since the District Court denied its own jurisdiction as a Federal Court, this Court had exclusive jurisdiction to review the judgment of the District Court under Judicial Code, Section 238.

POINT II.

This Court has no jurisdiction to review the judgment of the District Court except as prescribed in Judicial Code, Section 238.

Obviously the only purpose of seeking a review of the decree of the Circuit Court of Appeals in this Court is to obtain a review and a reversal of the judgment of the District Court.

Having established that it was the right of the plaintiff to review the judgment of the District Court directly in this Court under Section 238, it is necessary to examine the effect of plaintiff's failure to exercise that right, and the consequences of a review of that judgment by the Circuit Court of Appeals.

In *Ohio ex rel. Seney v. Swift & Co.* (Adv. Ops. December 1, 1922, p. 31) it appeared that a District Court denied a motion to remand a cause which had been removed to the Federal Court. The denial of this motion sustained the Federal Court's jurisdiction.

Upon the refusal of the Federal Court to remand the cause and after the introduction of evidence, the Court dismissed the relator's complaint.

Thereupon the relator took the case to the Circuit Court of Appeals, where he relied solely upon the jurisdictional question.

The Circuit Court of Appeals held that the appeal involved something more than jurisdiction and sustained the appeal. It concluded that it had jurisdiction of the cause and affirmed the judgment.

Thereupon the relator appealed to this Court again presenting the single question upon which he relied below.

This Court said:

The Act of March 3, 1891, from which these sections (Judicial Code Sections 128 and 238) took their origin has been uniformly construed as intended to distribute jurisdiction among the appellate courts to prevent successive appeals and relieve the docket of this Court. If appellant, in the way now attempted, can secure two reviews of a cause wherein he has presented to the Court below no controverted question except the jurisdictional one, a fundamental purpose of the statute will be frustrated. (*Robinson v. Caldwell*, 165 U. S., 359, 362, 41 L. Ed., 745, 746, 17 Sup. Ct. Rep., 343; *Loeb v. Columbia Twp.*, 179 U. S., 472, 278, 45 L. Ed., 280, 285, 21 Sup. Ct. Rep., 174; *Union & P. Bank v. Memphis*, 189 U. S., 71, 73, 74, 47 L. Ed., 712-714, 23 Sup. Ct. Rep., 604; *Carolina Glass Co. v. South Carolina*, 240 U. S., 305, 318, 60 L. Ed., 658, 664, 36 Sup. Ct. Rep., 293; *El Banco Popular v. Wilcox*, 255 U. S., 72, 75, 65 L. Ed., 510, 511, 41 Sup. Ct. Rep., 312; *The Carlo Poma*, 255 U. S., 219, 221,

65 L. Ed., 594, 595, 41 Sup. Ct. Rep., 309; *Alaska P. Fisheries v. Alaska*, 249 U. S., 53, 60, 61, 63 L. Ed., 474, 478, 39 Sup. Ct. Rep., 208.)

And we accordingly hold that whenever the suitor might have come here directly from the District Court upon the sole question which he chose to controvert in the Circuit Court of Appeals, the judgment of the latter Court becomes final and we cannot entertain an appeal therefrom."

In the case at bar it is indisputable that the plaintiff-in-error might have come here directly from the District Court.

Whether this privilege was as we contend, his only right, does not affect the result in this case.

If it was his only right then the Circuit Court of Appeals had no jurisdiction of the cause and upon the authority of *Union & Planters Bank v. Memphis*, 189 U. S., 71, 73, 74; *Newburyport Water Co. v. Newburyport*, 193 U. S., 561, 576, 579; *Four Hundred and Forty-three Cans of Egg Product v. United States*, 226 U. S., 172, 184; *Carolina Glass Co. v. South Carolina*, 240 U. S., 305, 318; *City of New York v. Consolidated Gas Co.*, 253 U. S., 219, 221; *The Carlo Poma*, 255 U. S., 219, 221, this Court should, under such circumstances, vacate the decree of the Circuit Court of Appeals and remand the cause to that Court with instructions to dismiss the plaintiff's writ of error in that Court.

If, on the other hand, the plaintiff had the option either to come here originally on the jurisdictional issue alone or to seek the judgment of the Circuit Court of Appeals upon this and such other issues as he deemed to be in the case, then, having chosen the latter course, upon the authority of *Ohio ex rel Seney v. Swift*, *supra*, the judgment of the Circuit Court of Appeals is final and the writ of error here should be dismissed.

Under either alternative this Court has no jurisdiction to review the judgment of the District Court.

POINT III.

Since this Court is now without jurisdiction to review the judgment of the District Court under this writ of error, or otherwise, the motion should be granted and the writ dismissed.

Dated, New York, N. Y., April 14, 1923.

Respectfully submitted,

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MAY 12 1923

WM. R. STANSBURY
CLERK

Supreme Court of the United States

October Term, 1922

No. 77

CHARLES G. BINDERUP, *Plaintiff-in-Error*,
against
 PATHE EXCHANGE, INC., *et al.*, *Defendants-in-Error*.

Reply Brief of the Defendants-in-Error on Motion to
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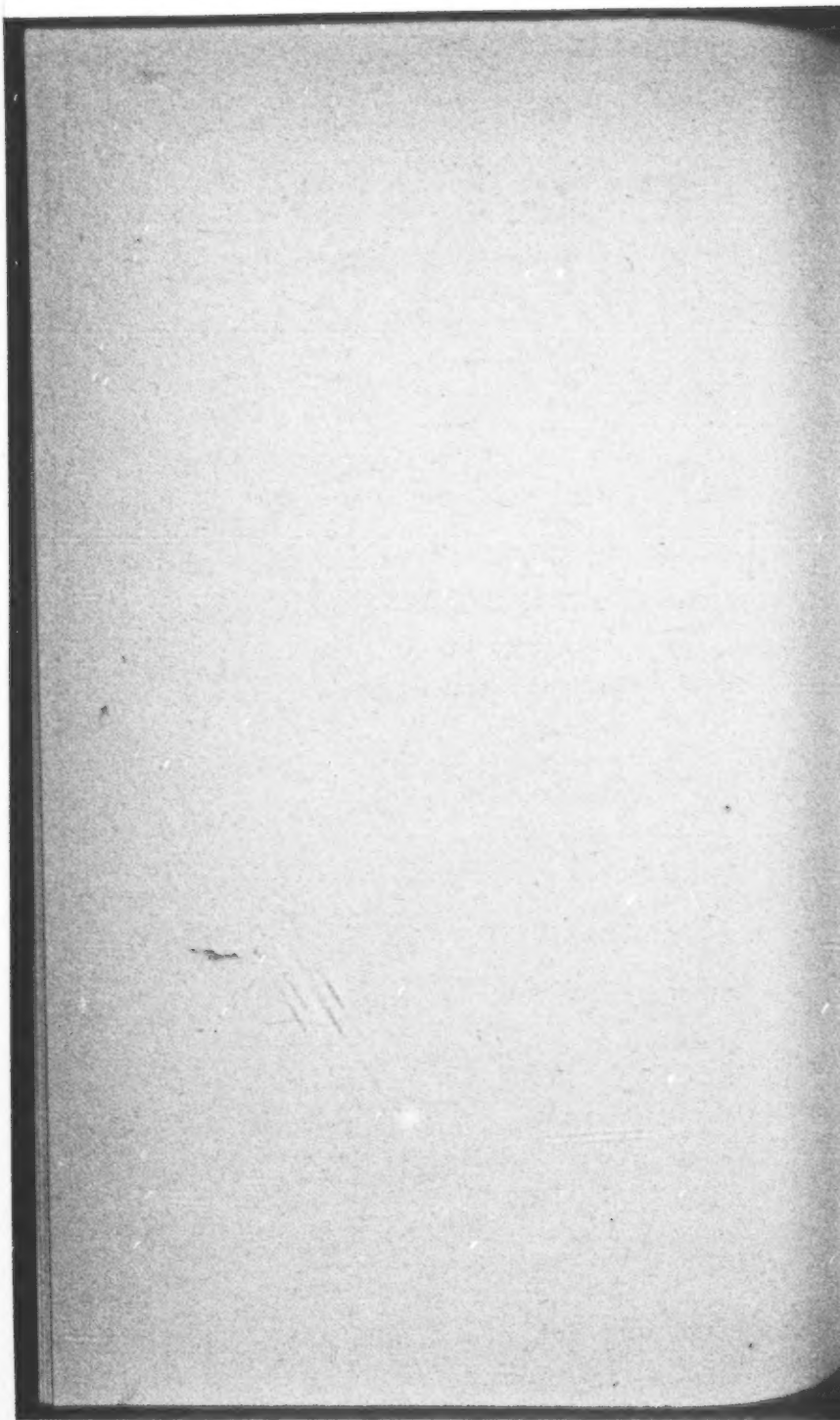
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Supreme Court of the United States

CHARLES J. BINDERUP,
Plaintiff-in-Error,

against

PATHE EXCHANGE, INC., *et al.*,
Defendants-in-Error.

Docket No. 478.

REPLY BRIEF OF DEFENDANTS-IN-ERROR ON MOTION TO DISMISS.

Two points in the argument of counsel for the plaintiff-in-error merit reply.

If, as the plaintiff claims, the form of the judgment of the District Court shows that the District Court sustained and exercised its jurisdiction and defeated the plaintiff on the merits notwithstanding the District Judge's decision that no jurisdiction existed, the unavoidable concession made by plaintiff's counsel at page 21 of their brief that

"the plaintiff-in-error might have brought his case direct to the Supreme Court of the United States from the District Court provided he had been willing to waive the issue upon the merits"

is fatal to his claim that this Court now has power to review the judgment of the Circuit Court of Appeals.

Ohio ex rel. Seney v. Swift (U. S. Adv. Ops., Dec. 1, 1922, p. 31).

The Act of September 14, 1922, amending Judicial Code Section 238, known as Section 238a, has no application to the case at bar.

The amendment is as follows:

"If an appeal or writ of error has been or shall be taken to, or issued out of, any Circuit Court of Appeals in a case wherein such appeal or writ of error should have been taken to, or issued out of, the Supreme Court; or if an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of, a Circuit Court of Appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper Court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to, or issued out of, the Court to which it is so transferred" (42 Stat. L., 837).

This amendment was passed too late to be of service to the plaintiff-in-error.

The judgment was entered in the District Court on April 20, 1921 (R., 86).

It was amended *nunc pro tunc* November 5, 1921 (R., 117).

It was affirmed in the Circuit Court of Appeals March 28, 1922 (R., 161).

It is not necessary that we should discuss the full meaning of this statute.

It is sufficient to point out in the case at bar that it clearly does *not* mean that after the wrong court has gone to judgment on a case it may then be shunted into another court for further consideration and review.

Besides the case at bar has not been removed to this Court in the manner described in the Act and the plaintiff-in-error has made no request that it be so removed.

On the contrary the case is here on writ of error.

Section 238a in no way enlarges this Court's jurisdiction.

There is no effort to create or confer upon this Court jurisdiction which it did not possess prior to this enactment.

The effort is to provide for a transfer to this Court or the Circuit Court of Appeals of cases over which either Court at the time of transfer, had jurisdiction.

The case at bar is not such a case.

In any aspect of the case this Court has no jurisdiction.

If, as we contend, the District Court denied its own jurisdiction notwithstanding the form of the judgment below which the plaintiff-in-error made no effort to correct, this Court alone had the power to review which was lost for the reasons stated in our brief in support of this motion.

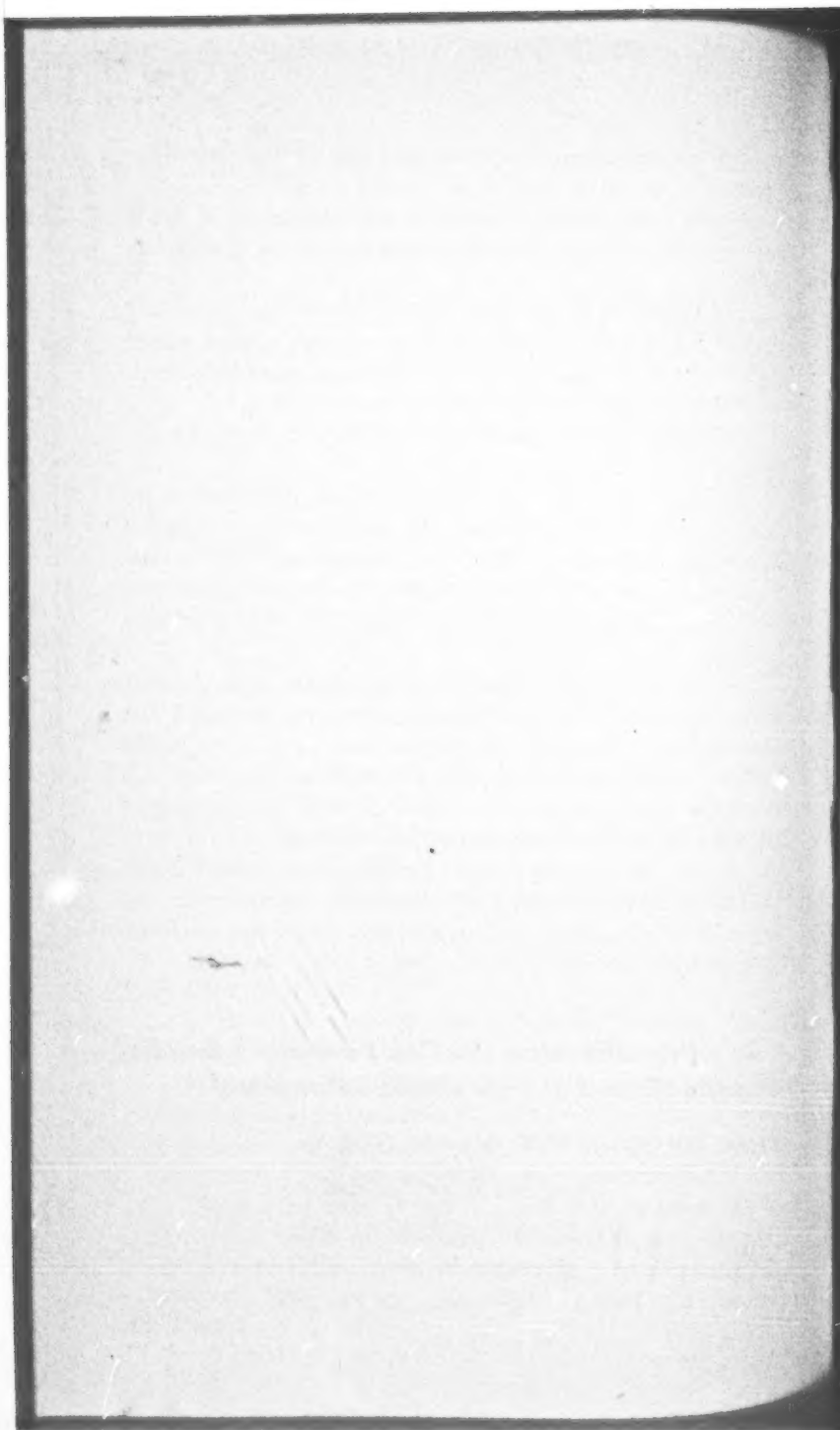
If, as the plaintiff-in-error contends, the District Court sustained its own jurisdiction and defeated the plaintiff-in-error upon the merits and, as now conceded by the plaintiff-in-error, the plaintiff-in-error had the privilege either to go to the Circuit Court of Appeals or to come here directly from the District Court, then, having chosen the former course, the decision of the Circuit Court of Appeals, under the authority of *Ohio ex rel. Seney v. Swift, supra*, is final and this Court has no jurisdiction to review it.

In either alternative this Court is without jurisdiction and the writ of error should be dismissed.

Dated, New York, N. Y., May 14, 1923.

Respectfully submitted,

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Supreme Court
FILED

SEP 17 1923

WM. R. STANBRO
CLERK

Supreme Court of the United States

October Term, 1923

No. 77

CHARLES G. BINDERUP, *Plaintiff-in-Error*,
against
PATHE EXCHANGE, INC., *et al.*, *Defendants-in-Error*.

BRIEF FOR THE DEFENDANTS-IN-ERROR

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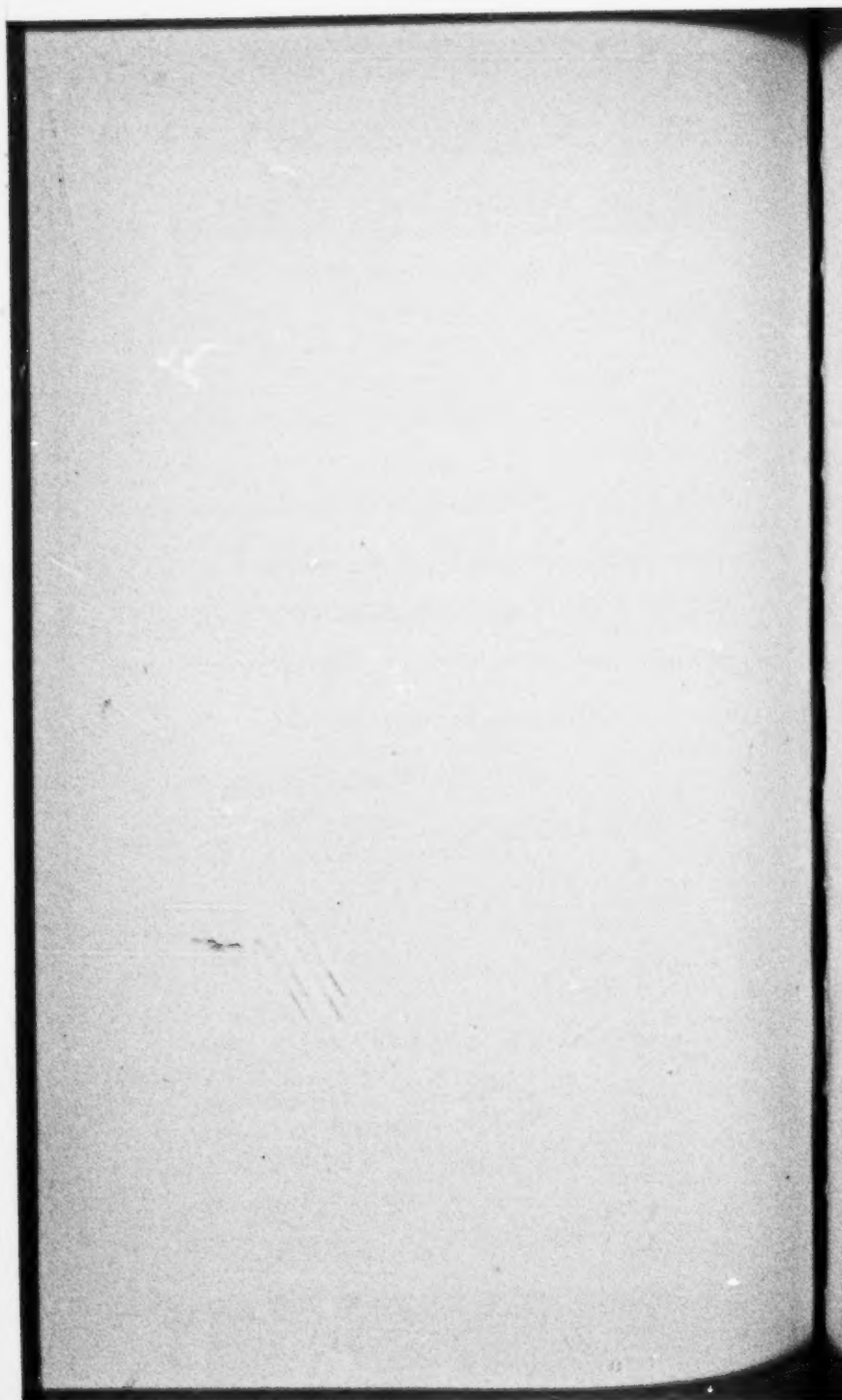


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CARD 4



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1. The first part of the paper is devoted to a general
discussion of the problem. It is shown that the
problem is of great importance in the theory of
the differential equations of the second order.
2. In the second part, the author considers the
case of a linear differential equation. It is shown
that the problem is solvable in this case.
3. In the third part, the author considers the
case of a nonlinear differential equation. It is shown
that the problem is solvable in this case.
4. In the fourth part, the author considers the
case of a system of differential equations. It is shown
that the problem is solvable in this case.
5. In the fifth part, the author considers the
case of a partial differential equation. It is shown
that the problem is solvable in this case.
6. In the sixth part, the author considers the
case of a system of partial differential equations. It is shown
that the problem is solvable in this case.



Supreme Court of the United States

October Term, 1923

No. 77

CHARLES G. BINDERUP,
Plaintiff-in-Error,

against

PATHE EXCHANGE, INC., *et al.*,
Defendants-in-Error.

BRIEF FOR THE DEFENDANTS-IN-ERROR.

The cause is here on writ of error directed to the Circuit Court of Appeals for the Eighth Judicial Circuit.

There is pending undetermined, a motion to dismiss for want of jurisdiction, which, on June 4, 1923, was passed until the hearing on the merits.

The plaintiff-in-error brought suit in the District Court of the United States for the District of Nebraska in the Omaha Division under Section 7 of the Act of July 2, 1890, known as the Sherman Act for alleged violations of Section 1 of that Act.

The jurisdiction of the District Court rested solely upon the claim that the controversy was one which arose under the Act in question, and since many of the defendants were citizens of the State of Nebraska, of which State plaintiff also was a citizen, there was no other ground of Federal jurisdiction.

After plaintiff's counsel had opened the case to the jury the defendants' counsel moved for a directed verdict upon the ground that the plaintiff had failed to allege in

his petition facts sufficient to constitute a cause of action under the Sherman Act or any act amendatory thereof.

After three days of argument the learned District Judge granted the motion as appears from the Court's opinion (R., 117-122) solely upon the ground that the District Court had no jurisdiction over the controversy because it was not one which affected or involved interstate commerce.

Thereafter judgment in favor of the defendants dismissing the plaintiff's petition was entered (R., 117).

Instead of taking his case directly to this Court under Judicial Code Section 238, the plaintiff took his case by writ of error to the Circuit Court of Appeals for the Eighth Circuit, and although the defendants-in-error duly moved that Court to dismiss the writ of error for want of jurisdiction (R., 149-150), that learned Court denied the motion to dismiss (R., 151), heard the cause as though upon its merits and in due course affirmed the judgment of the District Court solely upon the ground that the District Court had correctly decided that it was without jurisdiction over the controversy (R., 158).

Judge SANBORN dissented from this judgment (R., 158-160) and later allowed a writ of error to enable the plaintiff to review here the judgment of the Circuit Court of Appeals as well as the judgment of the District Court.

The plaintiff also applied to this Court for certiorari, which on October 16, 1922, was denied (U. S. Adv. Ops., 1922-23, p. 85).

The defendants-in-error now move to dismiss for want of jurisdiction.

POINT I.

The judgment of the District Court was reviewable only under Judicial Code, Section 238.

Judicial Code, Section 128 (Note 1), which was derived from Section 6 of the Act of March 3, 1891, expressly declares that the Circuit Court of Appeals shall exercise appellate jurisdiction to review the final decisions of the District Courts "in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court as provided in Section 238 * * *."

Judicial Code, Section 238 (Note 2), which was derived from Section 5 of the Act of March 3, 1891, authorizes appeals and writs of error to be taken from the

NOTE 1. Sec. 128. The circuit courts of appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the district courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in Section Two Hundred and Thirty-eight, unless otherwise provided by law; and, except as provided in Sections Two Hundred and Thirty-nine and Two Hundred and Forty, the judgments and decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the Patent Laws, under the Trademark Laws, under the Copyright Laws, under the Revenue Laws, and under the Criminal Laws, and in admiralty cases.

NOTE 2. Sec. 238. Appeals and writs of error may be taken from the district courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.

District Court direct to the Supreme Court in the following cases: "In any case in which the jurisdiction of the Court is in issue * * *."

In discussing the apportionment of appellate jurisdiction between these two courts, this Court in *United States v. Jahn*, 155 U. S., 109, 114, said:

"(1) If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this Court. (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the Circuit Court of Appeals, where, if the question of jurisdiction arises, the Circuit Court of Appeals may certify it. (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this Court, or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court. (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the Circuit Court of Appeals on the merits, and this he may do by way of cross-appeal or writ of error, if the defendant has taken the case there, or independently, if the defendant has carried the case to this Court on the question of jurisdiction alone, and in this instance the Circuit Court of Appeals will suspend a decision upon the merits until the question of jurisdiction has been determined. (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits."

Under the rules announced in the *Jahn* case it will be observed that the only instances in which a litigant has an election either to go directly to this Court and review the jurisdictional question alone, or to go first to the Circuit Court of Appeals on the merits, including the jurisdictional issue, and thereafter, in a proper case, to this Court invariably arise in cases in which the District Court *sustained* its own jurisdiction and therefore was in a position to decide other issues which might be reviewed in the Circuit Court of Appeals.

This is appropriately illustrated by *Boston & Maine R. R. v. Gokey*, 210 U. S., 155, 161; *Wilson v. Republic Iron & Steel Co.*, 257 U. S., 92, 96, in each of which cases the District Court *sustained* its own jurisdiction.

In the case at bar where the decision of the District Court *denied* its own jurisdiction it is entirely clear that even if the District Court after deciding that it was without power to proceed had assumed to determine other independent questions incidental to the merits of the controversy described in the complaint, this Court alone would have had jurisdiction to review the case because when a court holds that it is without power to proceed it is unable thereafter to determine any other issue involved in the controversy (R., 158).

True, the judgment of the District Court does not specify the grounds of dismissal but the opinion of the District Court, to which reference may be made for the purpose of ascertaining the grounds of the decision (*Loeb v. Columbia Township Trustee*, 179 U. S., 472, 482, 483), clearly states them (R., 117-121).

It is of course well settled that the question of jurisdiction which is reviewable directly in the Supreme Court under this Section must be one which involves the jurisdiction of the District Court as a Federal Court, and it has been said that "the question of the adequacy of the allegations of the bill to justify the relief sought

does not present a jurisdictional question within the meaning of Judicial Code, Section 238." (*De Rees v. Costaguta*, 254 U. S., 166, 173.)

But where, as here, the cause is cognizable exclusively by a Federal Court, in which Federal jurisdiction is invoked solely upon the ground that the cause is one arising under a Federal statute, and dismissal results from the failure of the petition in a fundamental respect to state facts sufficient to constitute such a cause of action, that judgment of dismissal denies the existence of jurisdiction in the District Court as a Federal tribunal and presents a strictly jurisdictional issue which is reviewable exclusively in this Court under Judicial Code, Section 238. (*Blumenstock Bros. v. Curtis Pub. Co.*, 252 U. S., 436, 440, 441; *The Steamship Jefferson*, 215 U. S., 130, 138; *The Ira M. Hedges*, 218 U. S., 264, 270; *Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S., 247, 250; *Weber v. Freed*, 239 U. S., 325, 329; *The Pesaro*, 255 U. S., 216, 218; *The Carlo Poma*, 255 U. S., 219, 220.)

What was said by Mr. Justice HOLMES in the case of *The Ira M. Hedges*, 218 U. S., 264, 270, disposes of the question.

In that case the District Court had dismissed a libel upon the ground that sitting as a Court of Admiralty it had no jurisdiction, on the facts stated to enforce contribution between the parties.

A direct appeal was taken to this Court.

The Court said:

"The first question is whether this Court has jurisdiction of the appeal. It is said that the dismissal of the libel although expressed to be for want of jurisdiction really is on the merits because payment of a judgment at common law is not a ground for contribution from a joint wrong doer not a party to the suit. There sometimes is difficulty in distinguishing between matters going to the jurisdiction and those determining the merits

(*Fauntleroy v. Lum.*, 210 U. S., 230, 235), and no doubt this case presents that difficulty.

"But perhaps it may be said that the two considerations coalesce here. The admiralty has a limited jurisdiction. If there are no merits in the claim it is of a kind that the admiralty not only ought not to enforce but has no power to enforce. At all events, the form of decree must be taken to express the meaning of the Judge. If the decree was founded as it purports to be on a denial of jurisdiction in the court, this court has jurisdiction of the appeal. For, all admiralty jurisdiction belongs to courts of the United States as such and therefore the denial of jurisdiction brings the appeal within the established rule. See *The Steamship Jefferson*, 215 U. S., 130, 138."

In *Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S., 247, 250, after pointing out that the plaintiff's cause of action was one which was cognizable only in a Federal Court, this Court said:

"The motion to dismiss challenged the jurisdiction of the Court as a Federal Court and its power 'primarily to hear complaints concerning wrongs of the character of the one here complained of' * * *. The order of dismissal was founded on the denial of jurisdiction and this court has power to review that ruling. *The Ira M. Hedges*, 218 U. S., 264, 271; *The Steamship Jefferson*, 215 U. S., 130. The case differs from *Darnell v. Ill. R. R. Co.*, 225 U. S., 243. There the Commission had found that the rate was unreasonable. The demurrer, based on the failure to allege that a reparation order had been made in favor of the plaintiff, did not attack the jurisdiction of the Court as a Federal Court, since the cause of action sought to be enforced was one which, if properly brought, could under the Act of June 18, 1910 (36 Stat., 539, 554, C. 309), have been maintained either in a State or Federal Court."

Blumenstock v. Curtis Pub. Co., 252 U. S., 436, 440, 441, is to the same effect. In that case, referring to an action under Section 7 of the Sherman Act, the Court said:

"The action is wholly statutory, and can only be brought in a District Court of the United States, and it is essential to the jurisdiction of the court in such cases that a substantial cause of action within the statute be set up.

In some cases it is difficult to determine whether a ruling dismissing the complaint involves the merits of the cause of action attempted to be pleaded or only a question of the jurisdiction of the Court. In any case alleged to come within the Federal jurisdiction it is not enough to allege that questions of a Federal character arise in the case, it must plainly appear that the averments attempting to bring the case within Federal jurisdiction are real and substantial. *Newburyport Water Co. v. Newburyport*, 193 U. S., 561, 576.

In cases where, as here, the controversy concerns a subject matter limited by Federal law, for which recovery can be had only in the Federal Courts, the jurisdiction attaches only when the suit presents a substantial claim under an act of Congress. This rule has been applied in bankruptcy. (*Grant Shoe Co. v. Laird Co.*, 212 U. S., 445) in copyright cases; (*Globe Newspaper Co. v. Walker*, 210 U. S., 356), in patent cases; (*Healy v. Sea Gull Specialty Co.*, 237 U. S., 479), in admiralty cases; (*The Jefferson*, 215 U. S., 130)."

Nor is there anything contrary to our contention in *Lamar v. United States*, 240 U. S., 60, 64, or in *Louie v. United States*, 254 U. S., 548, 551. In each case the trial Court sustained its own jurisdiction and defeated the defendant on the merits.

Nor is the rule modified by *Hart v. B. F. Keith Vaudeville Exchange, et al.*, decided by this Court on May 21, 1923 (43 Supreme Court Reporter, 540).

The question there, as it is in this case, is whether the petition states a case within the jurisdiction of the District Court.

It is of course true, as stated by this Court in the *Hart* case, that the existence of jurisdiction is determined by the allegations of the bill and that usually if the bill or declaration makes a claim which if well founded is within the jurisdiction of the Court, it is within that jurisdiction whether well founded or not.

But obviously if a bill or declaration as in the case at bar makes a claim which even though well founded is not within the jurisdiction of the Court the Court has power only so to decide.

In the *Hart* case this Court determined as matter of law that the facts stated constituted a case which involved interstate commerce and hence that the Court had jurisdiction of the controversy.

But if in the case at bar the conclusion is reached that interstate commerce is not in any way involved, then it would be equally correct to say that the Court is without jurisdiction of the controversy and that the petition fails in a jurisdictional respect to state facts sufficient to constitute a cause of action.

This is not a case where the petition is "wanting in merit" only.

It is a case in which a fundamental prerequisite of Federal jurisdiction is absent from the petition because, as a matter of law, the facts stated concerned local matters only and do not involve interstate trade or commerce.

The case at bar is ruled by *The Jefferson*, 215 U. S., 130, 138; *The Ira M. Hedges*, 218 U. S., 264, 271; *Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S., 247, 250; *Weber v. Freed*, 239 U. S., 325, 329; *Blumenstock Bros. v. Curtis Pub. Co.*, 252 U. S., 436, 440, 441; *The Pesaro*, 255 U. S., 216, 218, and *The Carlo Poma*, 255 U. S., 219, 221.

Since the District Court denied its own jurisdiction as a Federal Court, this Court had exclusive jurisdiction to review the judgment of the District Court under Judicial Code, Section 238.

POINT II.

This Court has no jurisdiction to review the judgment of the District Court except as prescribed in Judicial Code, Section 238.

Obviously the only purpose of seeking a review of the decree of the Circuit Court of Appeals in this Court is to obtain a review and a reversal of the judgment of the District Court.

Having established that it was the right of the plaintiff to review the judgment of the District Court directly in this Court under Section 238, it is necessary to examine the effect of plaintiff's failure to exercise that right, and the consequences of a review of that judgment by the Circuit Court of Appeals.

In *Ohio ex rel Seney v. Swift & Co.*, 260 U. S., 146, it appeared that a District Court denied a motion to remand a cause which had been removed to the Federal Court. The denial of this motion sustained the Federal Court's jurisdiction.

Upon the refusal of the Federal Court to remand the cause and after the introduction of evidence, the Court dismissed the relator's complaint.

Thereupon the relator took the case to the Circuit Court of Appeals, where he relied solely upon the jurisdictional question.

The Circuit Court of Appeals held that the appeal involved something more than jurisdiction and sustained

the appeal. It concluded that it had jurisdiction of the cause and affirmed the judgment.

Thereupon the relator appealed to this Court again presenting the single question upon which he relied below.

This Court said:

"The Act of March 3, 1891, from which these sections (Judicial Code Sections 128 and 238) took their origin has been uniformly construed as intended to distribute jurisdiction among the appellate courts to prevent successive appeals and relieve the docket of this Court. If appellant, in the way now attempted, can secure two reviews of a cause wherein he has presented to the Court below no controverted question except the jurisdictional one, a fundamental purpose of the statute will be frustrated. (*Robinson v. Caldwell*, 165 U. S., 359, 362, 41 L. Ed., 745, 746, 17 Sup. Ct. Rep., 343; *Loeb v. Columbia Twp.*, 179 U. S., 472, 478, 45 L. Ed., 280, 285, 21 Sup. Ct. Rep., 174; *Union & P. Bank v. Memphis*, 189 U. S., 71, 73, 74, 47 L. Ed., 712-714, 23 Sup. Ct. Rep., 604; *Carolina Glass Co. v. South Carolina*, 240 U. S., 305, 318, 60 L. Ed., 658, 664, 36 Sup. Ct. Rep., 293; *El Banco Popular v. Wilcox*, 255 U. S., 72, 75, 65 L. Ed., 510, 511, 41 Sup. Ct. Rep., 312; *The Carlo Poma*, 255 U. S., 219, 221, 65 L. Ed., 594, 595, 41 Sup. Ct. Rep., 309; *Alaska P. Fisheries v. Alaska*, 249 U. S., 53, 60, 61, 63 L. Ed., 474, 478, 39 Sup. Ct. Rep., 208.)

And we accordingly hold that whenever the suitor might have come here directly from the District Court upon the sole question which he chose to controvert in the Circuit Court of Appeals, the judgment in the latter Court becomes final and we cannot entertain an appeal therefrom."

In the case at bar it is indisputable that the plaintiff-in-error might have come here directly from the District Court.

Whether this privilege was as we contend, his only right, does not affect the result in this case.

If it was his only right then the Circuit Court of Appeals had no jurisdiction of the cause and upon the authority of *Union & Planters Bank v. Memphis*, 189 U. S., 71, 73, 74; *Newburyport Water Co. v. Newburyport*, 193 U. S., 561, 576, 579; *Four Hundred and Forty-three Cans of Egg Product v. United States*, 226 U. S., 172, 184; *Carolina Glass Co. v. South Carolina*, 240 U. S., 305, 318; *City of New York v. Consolidated Gas Co.*, 253 U. S., 219, 221; *The Carlo Poma*, 255 U. S., 219, 221, this Court should, under such circumstances, vacate the decree of the Circuit Court of Appeals and remand the cause to that Court with instructions to dismiss the plaintiff's writ of error in that Court.

If, on the other hand, the plaintiff had the option either to come here originally on the jurisdictional issue alone or to seek the judgment of the Circuit Court of Appeals upon this and such other issues as he deemed to be in the case, then, having chosen the latter course, upon the authority of *Ohio ex rel Seney v. Swift*, 260 U. S., 146, the judgment of the Circuit Court of Appeals is final and the writ of error here should be dismissed.

Under either alternative this Court now has no jurisdiction to review the judgment of the District Court.

The Act of September 14, 1922, amending Judicial Code Section 238, known as Section 238a, has no application to the case at bar.

The amendment is as follows:

"If an appeal or writ of error has been or shall be taken to, or issued out of, any Circuit Court of Appeals in a case wherein such appeal or writ of error should have been taken to, or issued out of, the Supreme Court; or if an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to,

or issued out of, a Circuit Court of Appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper Court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to, or issued out of, the Court to which it is so transferred" (42 Stat. L., 837).

This amendment was passed too late to be of service to the plaintiff-in-error.

The judgment was entered in the District Court on April 20, 1921 (R., 86).

It was amended *nunc pro tunc* November 5, 1921 (R., 117).

It was affirmed in the Circuit Court of Appeals March 28, 1922 (R., 161).

It is not necessary that we should discuss the full meaning of this statute.

It is sufficient to point out in the case at bar that it clearly does *not* mean that after the wrong court has gone to judgment on a case it may then be shunted into another court for further consideration and review.

Besides the case at bar has not been removed to this Court in the manner described in the Act and the plaintiff-in-error has made no request that it be so removed.

On the contrary the case is here on writ of error.

Section 238a in no way enlarges this Court's jurisdiction.

There is no effort to create or confer upon this Court jurisdiction which it did not possess prior to this enactment.

The effort is to provide for a transfer to this Court or the Circuit Court of Appeals of cases over which either Court at the time of transfer, *prior to adjudication*, has jurisdiction.

The case at bar is not such a case.

In any aspect of the case this Court has no jurisdiction.

If, as we contend, the District Court denied its own jurisdiction notwithstanding the form of the judgment below which the plaintiff-in-error made no effort to correct, this Court alone had the power to review which was lost for the reasons heretofore stated.

If, as the plaintiff-in-error contends, the District Court sustained its own jurisdiction and defeated the plaintiff-in-error upon the merits and, as now conceded by the plaintiff-in-error, the plaintiff-in-error had the privilege either to go to the Circuit Court of Appeals or to come here directly from the District Court, then, having chosen the former course, the decision of the Circuit Court of Appeals, under the authority of *Ohio ex rel. Seney v. Swift, supra*, is final and this Court has no jurisdiction to review it.

In either alternative this Court is without jurisdiction and the writ of error should be dismissed.

Upon the merits the defendants respectfully present the following argument under the following points:

1.

The facts stated in the complaint describe transactions which as a matter of law were local and not interstate and hence the allegations were insufficient in a jurisdictional respect to constitute a cause of action under the Sherman Act.

2.

The complaint was deficient and failed in other respects to state facts sufficient to constitute a cause of action under the Sherman Act or any other of the anti-trust statutes.

Statement of the Case.

The plaintiff was engaged in the business of exhibiting motion pictures at five theatres controlled by him all within the State of Nebraska, and in selecting and arranging for the exhibition of motion pictures controlled by the defendants in about 20 other theatres, also all within the State of Nebraska. The corporate defendants are distributors of motion pictures each controlling its own brand or make of pictures.

The individual defendants are the Omaha branch managers of the corporate defendants.

The Omaha Film Board of Trade is a membership corporation whose members are the branch managers of the corporate defendants.

It appears that certain of these branch managers complained to the Board of Trade charging the plaintiff with the offense known in the industry as "bicycling," which means that he was charged with renting from one or more of the defendants motion pictures for exhibition in the five theatres controlled by him and then, surreptitiously and without accounting to the defendant whose picture was involved, sub-renting the picture for exhibition in the 20 theatres which composed his so-called circuit of theatres, appropriating these sub-rentals to his own use.

There was a hearing before the Board of Trade, the plaintiff's conduct was condemned and the defendants thereafter refused to supply him with pictures for purposes of sub-rental, although they were willing to supply him with pictures for exhibition in the houses controlled by the plaintiff on conditions stated in the petition.

The defendants also notified the owners of the 20 theatres composing the alleged Binderup circuit that after a specified date their pictures could be obtained for exhibition in their houses only by dealing directly with the defendants, and as a result of these acts, set out in greater detail in the petition, plaintiff claims to have been ruined, and he alleges that there was a conspiracy on the part of the defendants to ruin him by the means described, which facts he conceived entitled him to treble damages under Section 7 of the Act of July 2, 1890, commonly known as the Sherman Act.

The plaintiff set up no contract of any kind or character with the defendants which entitled him to select or obligated them to let the plaintiff have their pictures for sub-rental by him for exhibition in theatres not controlled by him and the forms of contracts used by the defendants in their dealings with the plaintiff and other

exhibitors of pictures, which the plaintiff made a part of his complaint, expressly prohibits the sub-rental of any of the pictures controlled by any of the defendants.

It appears also that while the defendants are generally engaged in interstate commerce, all of the acts alleged to have been committed by them occurred within the State of Nebraska and in no way related to or affected interstate commerce.

Their branch offices in the City of Omaha, known as Exchanges, constitute the local facilities for the transaction of their business within the State of Nebraska, and their films come into the Omaha Exchange, where they are at rest, are unpacked, inspected, wound upon reels, re-wound and repaired when necessary and thereafter begin their commercial life in that community, being sent as occasion may require into the adjacent States.

But the plaintiff's business was wholly intrastate and there is not a single allegation in the complaint which indicates that he received a film from the defendants from beyond the State of Nebraska.

The plaintiff does not allege any general conspiracy on the part of the defendants by which trade was monopolized or restrained as the result of which he was injured.

He alleges simply a local conspiracy to ruin his purely local intrastate business, and upon the showing made by the plaintiff the learned District Court was of the opinion that the facts stated did not in any way involve interstate commerce and hence that there was a total absence of an essential element of a cause of action under any of the Federal Anti-Trust Acts, and for that reason that the District Court was without jurisdiction of the controversy. Thereupon the Court granted the defendants' motion for a directed verdict upon which judgment was entered dismissing plaintiff's petition.

Upon these facts and upon their merits we respectfully contend:

POINT I.

The facts stated in the complaint describe transactions which as a matter of law were local and not interstate and hence the allegations were insufficient in a jurisdictional respect to constitute a cause of action.

The facts show that the plaintiff's business was wholly within the State of Nebraska.

The individual branch managers of the several corporate defendants were and most of them still are residents of Omaha and citizens of the State of Nebraska, and they were, as we shall presently show, not alleged to be engaged in interstate commerce.

The corporate defendants are in most instances foreign corporations which are undoubtedly engaged generally in interstate commerce, since it is not disputed that they cause their films to be shipped from beyond the States of their origin into the branch offices or exchanges in the several States.

But the transactions described in the petition did not relate to interstate commerce.

They concerned local persons and local things only.

It appears that, pursuant to the established custom of the trade, the defendants send a specified quantity of films to their several exchanges at Omaha and after the films reach the exchanges they are unpacked and stored at the local offices of the defendants until they begin to rotate among the exhibitors of the State of Nebraska, incidentally going into Iowa and South Dakota, but having their situs at the Omaha exchange, where they become and remain a part of the general property in the State of Nebraska during their entire commercial life.

Consequently, when a Nebraska exhibitor wishes to rent a film from any of the defendants, no interstate

transaction or movement of the film is involved. The exhibitor does not order or rent the film from San Francisco or New York or any other place beyond the State. He rents it from the Omaha exchange and the movement of the film is wholly intrastate.

Hence when the exchange through its branch manager for any cause refuses to supply one or more films or agrees to supply them upon any specified condition, no interstate transaction is involved.

There are very few allegations of the petition which can be regarded as a statement which indicates that interstate commerce was even remotely connected with or restrained or affected by anything described in the petition.

The first allegation which may have some bearing on the subject is Paragraph 21½ (R., 6).

This simply alleges that during the year 1915, and at all times since that date, all of the defendants were engaged in the moving picture business, either as producers or manufacturers or distributors of moving picture films, and that the work of production and manufacture was usually perfected in New York City and after completion and appropriate announcement the picture would be released or sent out "from their said place of business in New York by express or parcel post to their various branch offices established by them in the large cities throughout the States * * * and in particular in Omaha, Nebraska, there at their branch offices and by their branch agent to be distributed to their patrons in the States of Nebraska, Iowa and South Dakota * * *."

This alleges very clearly that the defendants had established in Omaha, Nebraska, branch offices which constituted and were the local facilities established by them for the local distribution of their pictures, not only in Nebraska, but in Iowa and South Dakota, and that these offices were in charge of the defendants' branch managers and agents.

The reference to distribution in Iowa and South Dakota does not make transactions with the plaintiff, which all occurred in Nebraska, interstate in character.

By amendment to Paragraph 21½ (R. 1) the plaintiff asserted that the defendants controlled the distribution of the entire production of films in the United States and that no films could be procured from any other source that could be used in plaintiff's theatres and that no films had ever been produced in the State of Nebraska.

Notwithstanding this sweeping assertion if the films of the defendants were at rest in their local exchanges when the plaintiff endeavored to rent them, interstate commerce would not be affected by a refusal of the defendants' agents in Omaha to deliver to the plaintiff in the State of Nebraska.

In Paragraph 41 (R. 10), which was part of the plaintiff's original petition, it was said that "it frequently became necessary, in order to supply the demands of the plaintiff in that regard, for the *defendants* to procure at points outside of the State of Nebraska, moving picture films and the necessary advertising matter to accompany the same, constituting the program which plaintiff desired to exhibit at some or all of his moving picture theatres, *which films and advertising matter were in due season forwarded to him by express or parcel post.*

But it should be observed that plaintiff does not allege that the films were sent to him directly from beyond the State by the defendants. On the contrary, he says they were procured by the *defendants* from beyond the State and were forwarded to him by express and parcel post.

This means that the defendants' agents forwarded the films from the Omaha exchanges to the plaintiff in Nebraska by express and parcel post.

Still nothing but local matters are described by amendment to Paragraph 42½ (R. 11). A further attempt was made to allege something that related to interstate commerce.

It is alleged that in leasing films from their New York offices defendants "through their branch offices in Omaha" entered into written and oral contracts with the plaintiff on the terms described in the written contracts attached to the petition as Exhibits A, B and C, and that thereunder the title, control and right to recall the films was at all times retained by the home offices at New York.

The allegation shows that whatever was done with reference to these films was done "through their branch offices in Omaha."

Besides when the plaintiff attached the contracts to his petition the facts which appear therefrom would naturally control the statement of his conclusion concerning them. The essential thing which appears from these exhibits is that deliveries of the films were made by the defendants to the plaintiff and redeliveries from plaintiff to the defendants entirely at the Omaha branch offices, again conclusively indicating the local character of the transactions. (See Second Supplemental Record, pp. 166-167, 170.)

The contract with the Goldwyn Company (Second Supplemental Record, p. 160) appears to have come from the Kansas City office and appears to be a single and isolated transaction, both plaintiff and defendants alleging the usual course of business to be conducted from the Omaha branch office.

These are the only allegations which we find upon which it is sought to support the claim that the transactions alleged involved interstate commerce to such an extent as to support an action against the defendants under the Sherman Act.

As against these obviously inadequate allegations it affirmatively appears that everything complained of was in reality purely a local affair.

Even the conspiracy charged was to ruin the plaintiff's business, and, as we have said, the plaintiff's business was purely local.

It is, of course, not claimed that motion picture films may not be the subject of interstate commerce or of conspiracies in restraint of such trade and commerce.

U. S. v. Motion Picture Patents Co., 225 Fed., 800.

Nor do we dispute that transactions involving leases of personal property may constitute interstate commerce (*U. S. v. United Shoe Machinery Co.*, 234 Fed., 127, 143, 144, *TRIEBER, D. J.*, E. D., Mo., June 6, 1916), nor that the booking of performers for a theatrical circuit which requires the performers to pass from State to State, taking with them paraphernalia and stage properties, constitutes interstate commerce (*Marienelli v. United Booking Offices*, *LEARNED HAND, D. J.*, S. D., N. Y., 227 Fed., 165; *Hart v. B. F. Keith Vaudeville Exchange, et al.*, 43 Sup. Ct. Rep., 540).

What we do claim is that when the films reached the exchanges in Omaha they were at rest and ceased to be in interstate commerce and any agreement, combination or conspiracy by which their subsequent movements in Nebraska were restricted would not constitute interstate trade or commerce.

In *Mutual Film Corporation v. Ohio Industrial Com.*, 236 U. S., 230, 241, the Court said:

"There must be some time when the films are subject to the law of the State and necessarily when they are in the hands of the exchanges ready to be rented to exhibitors or have passed to the latter they are in consumption and mingled as much as from their nature they can be, with other property of the State."

The transactions of the defendants whereby their films were rented in the State of Nebraska were very different from the transactions involved in the case of the *United States v. United Shoe Machinery Co.*, 264 Fed., 138, 158 (E. D., Mo., March 31, 1920). In that case Judge TRIEBER said:

"The custom then prevailing was: The shoe manufacturer would notify the local representative of the defendants that he desired to lease certain machines, whereupon a blank printed order, prepared and furnished by the defendants, would be handed to him. He would then insert in a blank left for that purpose the kind of machine or machines he desired and sign the application. The order is:

'Please deliver to the undersigned, upon the terms and conditions hereinafter stated, for use in the factory of the undersigned at (insert St. Louis, Mo., or wherever the factory is located) the machines,' etc.

It also contains an obligation that he will hold the machines at his sole risk from injury, loss, or destruction by fire or otherwise, pay all taxes assessed and levied on them, will render full and accurate reports of the use of the machines, pay the rental and royalty established by the defendants, and pay all shipping and transportation charges, both to and from the factory of the Machinery Company. The order would then be sent to the home office of the defendant Maine company in the state of Massachusetts, and, if accepted, the machines would be shipped from Massachusetts, consigned to itself. Upon their arrival at the destination, they would be taken from the carrier by defendants' agent and installed in the shoe factory, and, when set up and put in operation, the lease would be executed."

After the passage of the Clayton Act the method in vogue indicated that the machines were shipped from the

State of Massachusetts direct to the shoe manufacturer "but the evidence showed (p. 160) that the machines are not consigned to the applicant, but are shipped in the same manner as under the former leases and the acceptance of the application is only delivered when they are set up and ready for operation."

"But," continued the Court, "the evidence also established that when the machines reach the place of destination they are not stored or held subject to the defendants' order or disposal but are immediately taken to the applicant's factory and there installed."

With the proof in this condition the Court had no difficulty in reaching the conclusion that the leases except when made with manufacturers located in the State of Massachusetts and delivered there were in commerce or trade among the States.

In the case at bar all of the films of each of the defendants were long since at rest in their respective exchanges at Omaha before it was possible for the plaintiff to have any transactions concerning them. The films of the defendants were not available for rental by the plaintiff or any other person in the State of Nebraska until the usual number of positive prints allotted to the Nebraska territory had reached the Omaha exchanges and had become as much a part of the other property in the State as from their nature they could be.

This is not a case "where orders are taken in one State for goods to be supplied from another State, which orders are transmitted to the latter State for acceptance or rejection and filled from stock in that State," which would constitute interstate commerce.

Singer Sewing Machine Co. v. Brickell, 233 U. S., 304;

Crenshaw v. Arkansas, 227 U. S., 389;

Brennan v. Titusville, 153 U. S., 289, 290, 302;

Caldwell v. North Carolina, 187 U. S., 622, 625;

Rearick v. Pennsylvania, 203 U. S., 507, 510, 511;
Dozier v. Alabama, 218 U. S., 124, 127-128;
Western Oil Refg. Co. v. Lipscomb, 244 U. S., 346.

We are within the principle of the cases which hold that "property brought from another State and withdrawn from the carrier and held by the owner with full disposition becomes subject to the local taxing power notwithstanding the owner may intend actually to forward it to a destination beyond the State."

Bacon v. Illinois, 227 U. S., 504, 513-515;
American Steel & Wire Co. v. Speed, 192 U. S., 500, 510, 519;
Kelley v. Rhoads, 188 U. S., 1, 5, 7;
Diamond Match Co. v. Ontonagon, 188 U. S., 82, 93-96;
Woodruff v. Parham, 8 Wall, 123;
Brown v. Houston, 114 U. S., 622, 632;
Coe v. Errol, 116 U. S., 517, 527;
Pittsburgh & Southern Coal Co. v. Bates, 156 U. S., 577, 588;
General Oil Co. v. Crain, 209 U. S., 211, 230, 231;
Browning v. Waycross, 233 U. S., 16, 22;
Southern Pac. Co. v. Arizona, 249 U. S., 472, 477.

In *Bacon v. Illinois*, 227 U. S., 515, 516, the Court said:

"The following facts are shown by the agreed statement: The grain had been shipped by the original owners, who were residents of southern and western States, under contracts for its transportation to New York, Philadelphia and other eastern cities which reserved to the owners the right to remove it from the cars at Chicago 'for

the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination' thereof. While the grain was in transit it was purchased by Bacon, the plaintiff-in-error, who succeeded to the rights of the vendors under the contracts of shipment. He was represented at the points of destination by agents through whom he disposed of grain and other commodities on the eastern markets, and the grain in question was purchased by him solely for the purpose of being sold in this way and with the intention to forward it according to the shipping contracts; it was not his intention to dispose of it in Illinois. Upon the arrival of the grain in Chicago, Bacon availed himself of the privilege reserved and removed it from the cars to his private elevator. This removal, it is said in the agreed statement of facts, was for the sole purposes of inspecting, weighing, grading, mixing, etc., and not for the purpose of changing its ownership, consignee or destination. It is added that the grain remained in the elevator only for such time as was reasonably necessary for the purposes above mentioned, and that immediately after these had been accomplished it was turned over to the railroad companies and was forwarded by them to the eastern cities in accordance with the original contracts of transportation. No part of the grain was sold or consumed in Illinois. It was while it was in Bacon's elevator in Chicago that it was included in the assessment as a part of his personal property.

But neither the fact that the grain had come from outside the State nor the intention of the owner to send it to another State and there to dispose of it can be deemed controlling when the taxing power of the State of Illinois is concerned. The property was held by the plaintiff-in-error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The plaintiff-in-error had withdrawn it from the carriers. The purpose of the with-

drawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination. (*Woodruff v. Parham, supra; Brown v. Houston, supra; Coe v. Errol, supra; Pittsburgh & Southern Coal Co. v. Bates, 156 U. S., 577; Diamond Match Co. v. Ontonagon, supra; American Steel & Wire Co. v. Speed, supra; General Oil Co. v. Crain, supra.*)"

In *Browning v. Waycross*, 233 U. S., 16, 22-23, the Chief Justice said:

"We are of the opinion that the court below was right in holding that the business of erecting lightning rods under the circumstances disclosed, was within the regulating power of the State and not the subject of interstate commerce for the following reasons: (a) Because the affixing of lightning rods to houses, was the carrying on of a business of a strictly local character, peculiarly within the exclusive control of state authority; (b) Because, besides, such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated. It is true that it was

shown that the contract under which the rods were shipped bound the seller, at his own expense, to attach the rods to the houses of the persons who ordered rods, but it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause. It is manifest that if the right here asserted were recognized or the power to accomplish by contract what is here claimed, were to be upheld, all lines of demarkation between National and state authority would become obliterated, since it would necessarily follow that every kind or form of material shipped from one state to the other and intended to be used after delivery in the construction of buildings or in the making of improvements in any form would or could be made interstate commerce."

Mr. Justice McKenna expressed the rule with special clarity in *General Oil Co. v. Crain*, 209 U. S., 211, 230-231, when he said:

"The company was doing business in the State, and its property was receiving the protection of the State. Its oil was not in movement through the State. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in *State &c. v. Engle (supra)*, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the State beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage, of putting it in and taking it from storage. The bill takes pains to allege this. 'Complainant shows that it is impossible in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges

incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary, in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil.'

This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the State and for which the protection of the State is necessary, a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in *American Steel & Wire Co. v. Speed*, 192 U. S., 500."

Consequently since it sufficiently appears (1) that title to the films at all times remains in each defendant or its licensor, (2) that the films are shipped from beyond the State of Nebraska at the commencement of their commercial life to the local exchange of the defendant at Omaha before they are the subject of transactions with the local exhibitors, (3) that when they reach Omaha they are consigned to the several defendants and that the films of each defendant remain under the exclusive control of the defendant thereafter until they are again set in motion within the State through the activity of the local branch managers, and (4) that when they reach their destination at Omaha they cease to be in transit and are unpacked from their original package, inspected, made ready for local exhibition and stored in the vaults of the branch offices, which constitute the local facilities for the transaction of business established by the several defendants within the State and that they are then at rest within the State of Nebraska and merged as much as from their nature they can be with other property in the State, and (5) that they so remain during their entire commercial life, it appears beyond doubt that the films have long since

ceased to be in interstate commerce and that none of the transactions alleged concerning them form a part of national trade.

Nor are the films plunged again into interstate commerce by the fact that the ultimate approval of the local contracts may in most instances rest with the home office of the defendant companies situated beyond the State, or by the fact that when the films reach the Omaha exchanges the defendants intend that they may be sent into Iowa or South Dakota, as the authorities cited show.

The point is that, even though the Nebraska films might be subject to control by the home offices of the defendants, nevertheless that control, even when exerted, did not result in movements or shipments of the films resting at Omaha, in interstate commerce.

There is a complete absence of allegation to indicate that there was or could have been any combination or conspiracy to restrain interstate commerce.

There is no claim that there was a conspiracy to fix prices of films or to limit or curtail production, or any agreement to do any of the usual things by which commerce has been commonly restrained and free competition impeded. There is nothing to indicate that as the result of such a conspiracy the plaintiff sustained injury. There is nothing but the reiteration of the baseless contention that the defendants combined and conspired to put the plaintiff out of business.

The case of *Ramsey Co. v. Associated Bill Poster Assn.*, 260 U. S., 501, presents an entirely different state of facts from those in the case at bar.

In that case there were allegations which showed that there was a combination of bill posters to destroy competition in the business of bill posting and secure a monopoly by limiting and restricting commerce in posters, to channels dictated by them and to exclude others from that trade by demanding non-competitive prices.

Nothing of the kind is alleged in the case at bar.

When it is recalled that the plaintiff's business played a small part in the business transacted within the State of Nebraska and that the whole Nebraska territory represents only 2 per cent. of the entire United States (R. 45), it is evident that, even if the transactions complained of had been interstate instead of intrastate, there would still be no such direct and unreasonable restraint upon interstate commerce as is essential to the maintenance of this action.

The absence of any allegations which show or tend to show the slightest restraint upon interstate commerce is fatal to the statement of a cause of action under the Sherman Act.

No case involving interstate commerce has been or can be established.

We have shown that the plaintiff was not engaged in interstate commerce and that neither the corporate nor the individual defendants were so engaged concerning any of the transactions complained of in the petition. More important still, we have shown that the subject matter of the supposed conspiracy was such that interstate commerce was not and could not have been restrained even in a remote degree by anything alleged in this case.

Hence we submit that it follows that no cause of action within the Sherman Act is alleged.

POINT II.

The complaint was deficient and failed in other respects to state facts sufficient to constitute a cause of action under the Sherman Act or any other of the anti-trust statutes.

The plaintiff claims to be entitled to an especially liberal construction and interpretation of his pleading because it was not tested by demurrer, but was subject to objection for the first time at the trial, and plaintiff cites the following authorities in support of this contention:

- Frederick Co. v. South Omaha Nat. Bk.*, 123 Fed., 641, 644, 8th C. C. A., 1903;
Western Real Estate Trustees v. Hughes, 172 Fed., 206, 210, 8th C. C. A., 1909;
Pennsylvania Mining Co. v. Jarrigan, 222 Fed., 889, 890, 8th C. C. A., 1915.

We have no quarrel with these or other authorities which announce a rule of liberal construction of a pleading under such circumstances *as to defects which may be waived* by not urging the objections to them prior to the trial.

But neither these nor any other authorities with which we are familiar hold that a petition which is deficient in one or more fundamental and jurisdictional respects is any the less deficient because the defects are not the subject of objections until the cause is called for trial.

In a case such as the case at bar which is cognizable only in a Federal court, in which jurisdiction is invoked solely upon the claim that the cause of action is one which arises under a Federal statute, every essential element of the court's jurisdiction must not only affirmative-

ly appear, but it must appear with substantial certainty and without doubt or ambiguity.

This was undoubtedly the rule of construction which the learned District Judge had in mind when he said (Supplemental R. 141):

"If there are fair inferences to be drawn from the pleadings which would not justify his recovery or would defeat recovery, these fair inferences must be indulged and the case must proceed no further until the allegations are of such specific certainty as to disclose first clearly and completely the jurisdiction of the Court and then the wrong within the jurisdiction of the Court which entitled the plaintiff to recover damages."

It is the same rule recognized by the Supreme Court, when it said with reference to an action under Section 7 of the Sherman Act:

"In order to maintain a suit under this act, the complaint must state a substantial case arising thereunder. The action is wholly statutory, and can only be brought in a District Court of the United States, and it is essential to the jurisdiction of the Court in such cases that a substantial cause of action within the statute be set up."

Blumenstock v. Curtis Pub. Co., 252 U. S., 436, 440.

We think the discussion which is to follow should be approached in the light of what was said by the Court in *Oscanyan v. Arms Co.*, 103 U. S., 261, 263, 264. In that case the Court directed a verdict after the opening of plaintiff's counsel, and, in affirming the judgment, the Court, in part, said:

"In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the

set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof. And if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case."

The case has always been cited with approval generally on other points.

Central Transp. Co. v. Pullman's Car Co., 139 U. S., 24, 39;

Woodstock Iron Co. v. Richmond & Danville Extension Co., 129 U. S., 643, 663;

West v. Camden, 135 U. S., 507, 521;

Compania La Flecher v. Brauer, 168 U. S., 104, 118;

Newman v. Moyers, 253 U. S., 182, 185;

New York Evening Post Co. v. Chaloner, 265 Fed., 204, 215;

United States v. Santini, 266 Fed., 303.

Nothing was said in *Butler v. Nat. Home for Soldiers*, 144 U. S., 64, 71, 72, which affects its application to the case at bar.

Here, as will presently appear, after a review of the petition has been completed, the statements of plaintiff's counsel affirmatively disclosed a case which did not affect or relate to a restraint of trade or a monopoly of any part of Interstate Commerce, and hence there was and is no cause of action.

The statement of plaintiff's counsel was in substantial accord with the allegations of the petition which were deficient in the respects hereinafter stated.

Paragraph 1 of the petition (R. 2) describes the plaintiff's business.

Paragraph 2 (R. 3) asserts that the cause is brought under the Act of July 2, 1890.

Paragraphs 3 to and including paragraph 21 (R. 3-6) describe the parties defendant.

By paragraph 21½ (R. 67) a brief outline of the manner in which the films reach Omaha is given, and by amendment the charge was made that the defendants controlled the distribution of the entire production of films in the United States, and that no films could be procured from any other source in the United States that could be used in the theatres of the plaintiff and his alleged circuit, and that no films have ever been produced in the State of Nebraska.

This allegation is elsewhere sufficiently discussed.

Paragraphs 22 to and including paragraph 40 (R. 7-10) contains a further description of the parties.

Paragraph 40½ alleges that prior to November 13, 1919, the defendants divided the United States into zones or districts "for the distribution of films from some therein centrally located points, of which the Omaha zones were comprised of parts of the States of Nebraska, Iowa and South Dakota and the theatres" described in the petition as owned and served by the plaintiff were all located within "all of the zones of said respective defendants served from Omaha," and that films of the defendants "could only be obtained from the centrally designated points within such zone, and the purchase of films could not be had from any of the defendants without their respective zones in which the exhibitors lived, and this plaintiff could procure no service from any point other than Omaha."

In irreconcilable conflict with this allegation it is alleged in Paragraph 41 (R. 10):

"That in carrying on his business as hereinbefore alleged it was necessary for the plaintiff to procure, by paying the price therefor, and transmission charges thereon from many of the de-

fendants above named moving picture films and advertising matter through their branch offices and agents at Omaha, Nebraska, *and it frequently* became necessary in order to supply the demands of the plaintiff in that regard for the said defendants to procure at points outside of the State of Nebraska moving picture films and the necessary advertising matter to accompany the same, constituting the program which plaintiff desired to exhibit at some or all of his moving picture theatres, which films and advertising matter were in due season forwarded to him by express or parcel post."

Paragraph 40½ and this portion of Paragraph 41 have already been discussed.

The balance of Paragraph 41 contains the first act charged against any of the defendants and will be discussed when we come to analyze and discuss each act with which the defendants are charged.

By Paragraph 42 of the petition (R. 11) the plaintiff alleged that in the month of April, 1919, all of the defendants, with certain specified exceptions,

"for the purpose of enabling them to control the prices and dictating the terms upon which they would transact business with their patrons operating theatres throughout the States of Nebraska, Iowa and South Dakota, and in order to enforce their claims, demands and decisions as to business conditions and terms upon their said patrons, caused to be organized at Omaha, Nebraska, the defendant Omaha Film Board of Trade" (Petition, par. 42).

Yet, notwithstanding this allegation, the plaintiff alleges in paragraph 22 of the petition (R. 7) "that said Film Board of Trade was incorporated to carry out the objects and purposes set forth in their articles of incorporation * * * and in the Bylaws," copies of which are annexed to the petition.

A review of these purposes and objects demonstrates that they are entirely lawful.

The plain purpose is to promote, not to restrain trade.

The effort is to establish in the industry proper standards of business integrity, and judging from the abuses prevalent in the trade prior to its formation, its advent was a consummation devoutly to be wished (R. 21-28).

Its membership was free and open to all.

No fines or penalties were in fact imposed for any violation of its articles or bylaws or rules.

Quite the contrary, its members reserved the right to extend credit or not as each member might determine for himself.

The Board assumed none of the functions attempted to be discharged by trade organizations in certain other trades or industries whereby prices were fixed or production limited or restricted, and the normal and natural flow of commerce was not in any way restrained.

The Board dealt with matters purely of local consequence, and as in this case, it dealt with particular practices of individuals within the State of Nebraska whose conduct was detrimental to the interests of the industry in that State as a whole.

We deem the most important sections of the bylaws of the Board of Trade to be the following:

"ARTICLE XXI.

(SECOND SUPPLEMENTAL RECORD 156.)

1. That for the purpose of defending its members against imposition, wrongful failure to lift C. O. D. shipments of films, the taking of unfair advantage of film service, etc., the Corp. may establish in the office of the Secretary of the Board a clearing house of protective information.

2. That any such information on file with the Secretary desired by any member of the Corporation in good standing shall, on request, be furnished, free of charge.

3. That when any acts against which it is the purpose of the Corporation to protect its members, as hereinbefore stated, come to the attention of any member of the Corporation they shall be reported immediately in writing, on forms furnished the members, to the Secretary of the Corporation. This information is to be sent immediately to the members of the Board of Trade.

4. That the members of the Board shall keep the Secretary informed of any developments in any case previously reported to him and shall report the final disposition of the case.

5. That the Secretary shall be notified immediately of any change of address or of the opening of a new theatre by any party who has been so reported, to him.

6. That it shall be the duty of the Secretary to write every party committing said acts, and so reported to him, requesting said party to state his reasons for such action.

7. That each member of the Board, shall, on request, furnish to the Secretary in connection with the said purposes, such information regarding existing and prospective accounts as may be requested by him.

8. That all information furnished to any member of the Corporation is for his use solely to protect him against said practices and to aid him in determining the propriety of extending credit or the value and condition of an existing credit, and shall be held in strict confidence and not revealed by him to the person reported nor to any other person.

9. That irrespective of the wishes or request of other members of the Corporation each member thereof shall be free to refuse or grant credit to any person.

10. That all expenses incident to the obtaining and furnishing of regular credit information shall be paid by the Corporation.

11. That all expenses incident to the obtaining of information requiring special investigation shall be, in each case, paid by the member or members requesting same."

A comparison of the charter and by-laws of other associations the validity of which has been upheld by the highest authority, shows that there is not a single unlawful or even questionable purpose indicated in the charter, by-laws or rules of the association here involved.

Anderson v. United States, 171 U. S., 604, was an equity suit brought by the Government against the members of a voluntary unincorporated association known as the Traders Live Stock Exchange. A decree was sought dissolving the Exchange and enjoining its members from entering into or continuing any sort of combination to deprive any people engaged in shipping, selling, buying and handling live stock received from other States, of full access to the markets at Kansas City, and to the same facilities afforded by the Kansas City stock yards to defendants and their associate members of the Traders Live Stock Exchange.

The preamble to the articles of association of the Exchange read as follows:

"We, the undersigned, for the purpose of organizing and maintaining a business exchange, not for pecuniary profit or gain, but to promote and protect all interests connected with the buying and selling of live stock at the Kansas City Stock Yards, and to cultivate courteous and manly conduct towards each other, and give dignity and responsibility to yard traders, have associated ourselves together under the name of Traders' Live Stock Exchange, and hereby agree, each with the other, that we will faithfully observe and be bound by the following rules and by-laws and such new rules, additions or amendments as may from time to time be adopted in conformity with the provisions thereof from the date of organization."

The objectionable rules complained of are Rules 10, 11, 12 and 13, which respectively read:

"Rule 10. This Exchange will not recognize any yard trader unless he is a member of the Traders' Live Stock Exchange.

Rule 11. When there are two or more parties trading together as partners, they shall each and all of them be members of this exchange.

Rule 12. No member of this exchange shall employ any person to buy or sell cattle unless such person hold a certificate of membership in this exchange.

Rule 13. No member of this exchange shall be allowed to pay any order, buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party."

At page 616 Mr. Justice PECKHAM, writing for the Court, said:

"There is no evidence that these defendants have in any manner other than by the rules above mentioned hindered or impeded others in shipping, trading or selling their stock, or that they have in any way interfered with the freedom of access to the stock yards of any and all other traders and purchasers, or hindered their obtaining the same facilities which were therein afforded by the stock yards company to the defendants as members of the Exchange, and we think the evidence does not tend to show that the above results have flowed from the adoption and enforcement of the rules and regulations referred to.

In regard to rule 10 (This exchange will not recognize any yard trader unless he is a member of the Traders Live Stock Exchange) the question is whether, without a violation of the act of Congress, persons who are engaged in the common business as yard traders of buying cattle at the Kansas City stock yards, which come from different States, may agree among themselves that they

will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members, nor will they buy cattle from those who also sell to yard traders who are not members of the Association.

It will be remembered that the Association does no business itself. Those who are members thereof compete among themselves and with others who are not members, for the purchase of the cattle, while the Association itself has nothing whatever to do with transportation nor with fixing the prices for which the cattle may be purchased or thereafter sold. Any yard trader can become a member of the Association upon complying with its conditions of membership, and may remain such as long as he comports himself in accordance with its laws. A lessening of the amount of the trade is neither the necessary nor direct effect of its formation, and in truth the amount of that trade has greatly increased since the association was formed, and there is not the slightest evidence that the market prices of cattle have been lowered by reason of its existence. There is no feature of monopoly in the whole transaction . . .

From very early times it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together. The object of the association has in many cases been to provide for the ready transaction of the business of the associates by obtaining a general headquarters for its conduct, and thus to ensure a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them and enforcing the same by penalties for their violation. The agreements have been voluntary, and the penalties have been enforced under the supervision and by members of the association. The preamble adopted by the association in this case shows the ostensible purpose of its formation.

It was not formed for pecuniary profits, and a careful perusal of the whole agreement fails, as we think, to show that its purpose was other than as stated in the preamble. In other words, we think that the rules adopted do not contradict the expressed purpose of the preamble, and that the result naturally to be expected from an enforcement of the rules would not directly, if at all, affect interstate trade or commerce. The agreement now under discussion differs radically from those of *United States v. Jellico Mountain Coal & Coke Co.*, 46 Fed. Rep., 432; *U. S. v. Coal Dealers Assn. of Calif.*, 85 Fed. Rep., 252, and *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. Rep., 271. The agreement in all of these cases provided for fixing the prices of the articles dealt in by the different companies, being in one case iron pipe for gas, water, sewer and other purposes, and coal in the two other cases. If it were conceded that these cases were well decided, they differ so materially and radically in their nature and purpose from the case under consideration, that they form no basis for its decision. This association does not meddle with prices and itself does no business. In refusing to recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting or in any manner restraining interstate commerce, which, if affected at all, can only be in a very indirect and remote manner.

The design of the defendants evidently is to bring all the yard traders into the association as members, so that they may become subject to its jurisdiction and be compelled by its rules and regulations to transact business in the honest and straightforward manner provided for by them. If while enforcing the rules those members who use improper methods or who fail to conduct their business transactions fairly and honestly are disciplined and expelled, and thereby the number of members is reduced, and to that extent the number of competitors limited, yet all this is done, not with the intent or purpose of affecting in the slightest degree interstate trade or commerce, and such

trade or commerce can be affected thereby only most remotely and indirectly, and if, for the purpose of compelling this membership, the association refuse business relations with those commission merchants who insist upon buying from or selling to yard traders who are not members of the association, we see nothing that can be said to affect the trade or commerce in question other than in the most roundabout and indirect manner. The agreement relates to the action of the associates themselves, and it places in effect no tax upon any instrument or subject of commerce; it exacts no license from parties engaged in the commercial pursuits; and prescribes no condition in accordance with which commerce in particular articles or between particular places is required to be conducted (*Sherlock v. Alling*, 93 U. S., 99; *Smith v. Alabama*, 124 U. S., 465, 473; *Pittsburg & Southern Coal Co. v. Louisiana*, 156 U. S., 590, 598)."

Many authorities sustain the legality of trade association activities involving conduct much more serious than anything alleged against the defendants.

- Gladish v. Stock Exchange*, 113 Mo., 726;
Dickinson v. Board of Trade, 114 Ill. App., 295;
Stovall v. McCutcheon, 107 Ky., 577;
State ex rel. Cuppel v. Milwaukee Chamber of Commerce, 47 Wis., 670;
Chicago Board of Trade v. United States, 246 U. S., 231;
State v. Duluth Board of Trade, 107 Minn., 506;
Hopkins v. United States, 171 U. S., 578, 592, 600;
Board of Trade v. Christie Grain & Stock Co., 198 U. S., 236, 252.

We come now to a consideration of the cases in which associations formed for the alleged purpose of improving and bettering trade conditions were in reality used as instrumentalities through which trade was actually and unlawfully restrained, and by means of which in some instances monopolies were successfully maintained.

In every case either the purposes and objects which the association or its members were endeavoring to accomplish were obviously illegal, or else the means by which it was sought to accomplish them were unlawful.

In *United States v. King*, 250 Fed., 908 (District Court of Mass., 1916, MORRIS, D. J.), there was an association of potato shippers known as the Aroostook Potato Shippers Association which assigned the following grounds for blacklisting members and those who were not members.

- (1) Unreasonable failure to pay to members money lawfully due.
- (2) Unreasonable refusal to accept and pay for potatoes duly shipped.
- (3) Deductions from agreed price claimed by a receiver upon improper grounds.

The decision whether the facts in any given transaction warranted blacklisting was made by the Listing Committee of the Association *without notice and without hearing the receiver thereby affected*.

A receiver of Aroostook potatoes might be blacklisted by the Committee if the Committee disapproved of his actions under contract between himself and any member of the association. Once blacklisted no member of the association was permitted to deal with him in Aroostook potatoes *under penalty of being blacklisted himself and fines rapidly increasing in severity for successive dealings were authorized and imposed*.

Nobody outside the association could deal with the blacklisted person without also being subject to blacklisting.

The indictment charging a conspiracy to restrain interstate commerce by this means, there being appropriate allegations showing the interstate character of the transactions involved, was upheld on demurrer.

(See same case on earlier indictment, *U. S. v. King*, 229 Fed., 275.)

United States v. Hollis, 246 Fed., 611 (District Court of Minn., 1917), was a Government injunction suit under the Sherman Act to restrain a conspiracy and combination in restraint of interstate trade accomplished through the Northwestern Lumbermen's Association and other similar associations.

It appeared that the lumber trade was composed of:

(1) Manufacturers who received logs from the forests and who sawed them into various sizes and lengths of timber and lumber required by the trade for building and manufacturing purposes and shipped such products from the points of manufacture by railroad or steamship lines through and into the States of the United States and the various markets where such lumber products were required.

(2) Wholesalers who deal in lumber and its products and are usually located at or near large markets or centers of trade, the wholesaler sometimes maintaining a yard for receiving and storing lumber purchased by him from the manufacturer. In some instances the wholesaler simply receives orders from customers and transmits them to the manufacturers.

(3) Retailers, i. e., those who receive and store lumber purchased either from the manufacturer or

wholesaler and who sell for building or manufacturing purposes, in the city where the retail yard is located.

(4) Consumers — composed of constructing builders, converters or manufacturers, the United States Government, and sometimes municipalities, railroads, etc.

The charge was that the defendants conspired:

(1) To eliminate unreasonably or to restrict competition except as between retail yards for the trade of various classes of consumers.

(2) To force the ultimate consumer to buy at retail prices from regularly established and organized retail lumber merchants recognized by retail associations.

(3) To force the ultimate consumers to buy from the regular retail merchant who was operating a yard in the vicinity where such lumber was to be used.

(4) To prevent any wholesale dealers or manufacturers from quoting prices or selling and shipping to consumers.

It should be noted that these purposes and desired results obviously tend to restrain interstate commerce when sought to be achieved in a trade or industry of an interstate character such as the lumber trade.

Thus, the purpose and object to eliminate competition among the manufacturers and wholesalers by forcing the consumer to buy only from the retailer is obviously unlawful because plainly one, the direct effect of which is to restrain trade.

There is no illegality in a consumer buying lumber from a manufacturer directly or from a wholesaler, and

any plan, purpose or object to prevent this lawful trade is plainly illegal.

This same illegal purpose was the keynote of every charge made against the defendants.

The means by which the defendants undertook to accomplish their illegal purpose and design was through the instrumentality of the Northwestern Lumbermen's Association. This was an unincorporated association organized in 1890 and composed of retail lumber dealers in the States of Minnesota, Iowa, North Dakota, South Dakota and part of Nebraska.

The original constitution and by-laws, which were adopted before the enactment of the Sherman Act, contained many paragraphs which clearly indicated its unlawful purpose, but in 1901 a new constitution and declaration of principles was adopted which emasculated many of the statements which indicated an unlawful purpose in the original and substituted in their place statements to the effect that the sole object of the association was to keep its members informed "of those manufacturers and wholesalers who may persist in selling at retail in competition, directly or indirectly, with any member of this association, to the end that the members thereof may refrain from dealing with such manufacturers and wholesalers and their agents, if they or any of them so elect or desire."

Thus it appears that even the new charter and by-laws, which contained protestations of its laudable object, still disclosed the taint of illegality. The means by which the desired ends were to be and actually were attained including the following:

Prior to 1907 the means included expulsion of members, blacklists of offending wholesalers, fines and penalties for offending members, co-operation with other similar associations; the exchange of blacklists and other information; furnishing of information to lumber credit agencies touching the status of various persons;

publication in co-operation with other similar associations of a handbook for the lumber trade containing among other things a list of manufacturers who sold to consumers directly and other "non-ethical" dealers; the formation of the Lumber Secretaries' Bureau of Information for the purpose of co-operation between the different associations of retail lumber dealers in carrying out the aims and purposes stated.

The Lumber Secretaries' Bureau grew to such an extent that in 1903 its President asserted that the association was acting in unison with fifteen other retail associations representing 5,000 lumber yards, making a total of 7,200 yards covering territory from the western slope of the Alleghanies in the East to the eastern slope of the Rockies on the West, and from Winnipeg to the "Sunny South by the Sea." It was estimated that 94 per cent. of all the lumber used in this area reached the consumer through "proper channels," i. e., through the retail yards.

In later years (after 1907) the practices of former years were abandoned. Expulsion of members, imposition of penalties upon members, were no longer relied upon, and publicity in various forms became the chief means of continuing to accomplish the original unlawful object and purpose.

A so-called "Customers' List" was prepared annually by the Secretary of the association, which contained the names of wholesalers with whom the retailer dealt and concerning whom he desired to be kept informed. By exchanging lists with other similar associations and by other means the Secretary would become advised of the "irregular and unethical" practices of these wholesalers, which practices were entirely lawful and consisted only in selling their lumber to a consumer direct, and the Secretary would then notify the retailer that the wholesaler was so engaged to the detriment of the retail business.

Sometimes as many as 1,200 retailers, customers of the wholesalers, would be notified that the wholesaler had violated the code of ethics promulgated by the retailer for observance by the wholesaler in the lawful effort to sell his goods directly to the consumer, and the entire record showed that, notwithstanding the laudable expressions used to announce the unlawful purposes of these associations, the secretaries and the members were continuing to protect their members "in the same old way" and without the necessity of putting "it down in black and white in our constitution and by-laws."

Hence it is not surprising that the Court granted a decree for the Government

"directed specifically toward the illegal activities
 * * * carried on by them in interference and restraint of interstate commerce, to wit, the use of customers' lists in collecting, compiling and distributing information, whether to the members of the association, to trade publications or other newspapers, to credit agencies or to the public at large as to sales by wholesalers and manufacturers direct to consumers, including mail order houses and co-operative yards."

But there is nothing in this case which either decides or intimates that it is unlawful for an association to inform its members of the illegal and improper acts of their customers which render them unfit to be dealt with, especially when the honest purpose or object of the association is not remotely connected with restraint of trade or commerce, but is directed only to the suppression of illegal practices indulged in by the exhibitors.

In *Eastern States Retail Lumber Dealers Association v. United States*, 234 U. S., 600, the particular supposed trade evil which the association sought to correct was the practice of certain wholesalers in dealing directly with the consumer. But this practice was not unlawful or even uneconomic. It was perfectly lawful and desirable

for the manufacturers and wholesalers of lumber to sell their product directly to the consumer.

To prevent this was the chief object and purpose of the association.

This object, while directed against interstate trade and commerce in lumber, plainly restricted competition and restrained such trade.

Consequently, the object and purpose of the association was illegal.

The means adopted by the members to accomplish this unlawful purpose was the circulation among the retailers of so-called official reports issued by the appellants, giving the names of wholesalers who sold directly to the consumers.

The effect of these acts was actually to restrain interstate commerce on a large scale and it was held that the Sherman Act was violated.

United States v. New England Fish Exchange, 258 Fed., 732 (District Court of Mass., 1919), but heard before BINGHAM and JOHNSON, C. JJ., and ALDRICH, D. J., was a Government suit for injunction based on Sections 1 and 2 of the Sherman Act and Sections 6 and 7 of the Clayton Act.

"It is conceded," said the Court, at page 746, "that an exchange is a proper instrumentality through which to conduct the business, provided it is governed by rules and regulations that do not impose an undue restraint upon the trade and that the trade conditions existing between the dealers and fishermen in 1908 were such as to call for the introduction of an instrumentality of this nature.

"The contention, however, is that the purpose of the dealers in the institution of the exchange and in the establishment of the rules and regulations that were adopted was to confine the flow of fish through the pier or T wharf to themselves and to otherwise impose undue restraint upon the trade.

• • • • •

(P. 748) "The result of the combined action of the dealers was that 83 per cent. of all the fresh fish and 95 per cent. of all the ground fish brought to Boston was landed at the Fish pier, which gave absolute control to these dealers of all the fish passing through the pier and a predominating control of all the fresh fish dealt in throughout the North Atlantic States, rendering it impossible for an outside dealer to build up a business in interstate trade. We think, therefore, that the defendant dealers, by combining in the manner above outlined with a view to centralizing and controlling the flow of fish in interstate commerce, and the acquisition of that control, violated the Sherman Law and unduly and unreasonably restrained interstate trade in fresh fish."

Here there was no apparent unlawful purpose in the formation of the exchange, but it was used as a means to establish a plain monopoly which obviously restrained trade.

Thus the continuing purpose and the means by which it was accomplished were both unlawful.

One of the rules of the exchange condemned by the Court precluded commission men from selling to retailers.

The Court said, at page 749:

"This rule should be amended so as to allow commission men having privileges on the exchange to sell to all dealers, wholesale or retail."

The exchange had at different times engaged in the purchase and sale of fish on its own account and for others, but a recent rule prohibited the practice. The Court said it saw no objections to the rule prohibiting the practice, and that "any infraction of it or resort to the former practice should be restrained." The Court held that "all the rules limiting the privileges to wholesale fish dealers and prescribing conditions upon which a dealer

shall be regarded as a wholesale fresh fish dealer should be abolished and their enforcement restrained."

Belf v. United States, 259 Fed., 822, 823 (3d C. C. A., 1919), was a case which related to the tile industry, which consists of three classes of persons: tile manufacturers, tile dealers and tile setters. The defendants were tile dealers in and about Philadelphia, and together formed the Philadelphia Tile Mantel & Grate Association, ostensibly for the correction of trade abuses and evil practices and the promotion of sound business policies.

The Court said:

"The controversy, therefore, concerns not the unlawfulness of the combination, but the unlawfulness of the conduct of some of its members in carrying out its conceivably lawful purposes. This conduct consisted * * * in excluding trade competitors from membership in the association, in the refusal of association dealers to buy tiles from manufacturers that sold tiles to non-member dealers and in entering into agreements with a tile setters labor union whereby association dealers obtained from the union, first, a preference over non-member dealers in the employment of union tile setters, and, second, a promise by the union to supply no tile setters to tile dealers outside of the association, thereby creating a boycott of non-member tile dealers by making it impossible for them to get materials for their business and labor with which to carry it on."

A combination of dealers that excludes competitors, i.e., other dealers, from membership in the association, tends to restrain trade and to create a monopoly.

In our case the exchange managers comprised the Board of Trade. There is no complaint that any discrimination was exerted against one or more exchange men who, if admitted to membership, might have supplied the plaintiff with films. Moreover, in the case at bar the membership was free and open to all classes engaged in the industry.

In the *Belfi* case, the objectionable conduct or means by which interstate trade was restrained consisted in part in the refusal of association dealers to buy tiles from manufacturers who sold tiles to non-member dealers. There was a general policy on the part of the member dealers not to buy tiles in interstate commerce from manufacturers who sold their tiles to non-members. In other words, an agreement that members would buy tiles only from those manufacturers who declined or refused to sell to dealers whose only offense was that they were not members of the trade association.

In the case at bar there was no agreement discriminating in any way against non-members of the Board of Trade and the refusal of these defendants to supply the plaintiff with films was not designed or alleged to have been designed to carry out or effect a plan or conspiracy to restrain trade or commerce.

So, also, the agreement between the tile dealers' association and the labor union, whereby the association obtained from the union, first, a preference over non-member dealers in the employment of union tile setters, and, second, a promise that the union would supply no labor to dealers outside of the association, made it impossible for non-member tile dealers to obtain either material or labor with which to carry on their legitimate business.

This conduct was obviously an unlawful restraint of trade, but nothing like it obtained in the case at bar.

The Court pointed out that the difference between the *Belfi* case and the *Hopkins* and *Anderson* cases is that in the *Belfi* case the evidence showed that the *acts* of the defendants, quite apart from the lawful objects announced in their articles of association, actually restrained interstate commerce.

In the case at bar no variance between the ostensible purposes and objects of the Board of Trade and its actual performances is alleged in the petition, disregard-

ing, as we have a right to do, the mere conclusions of the pleader.

In *Lawlor v. Loewe*, 235 U. S., 522, the Court affirmed a judgment in favor of the plaintiffs awarding damages (209 Fed., 721), and said:

"The substance of the charge is that the plaintiffs were hat manufacturers who employed non-union labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that in pursuance of a general scheme to unionize the labor employed by the manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers) the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers in other states and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiffs' commerce with other states" (p. 533).

It appears from this statement that the primary object and purpose was to unionize the labor employed by the manufacturers of fur hats.

This was not an illegal purpose.

While this object was not of itself illegal, it was entirely right and lawful for the manufacturers to decline to unionize and they were entitled to protection against aggression or interference with that right.

But the means included not only a primary and secondary boycott, but a boycott which on a large scale restrained interstate commerce.

At page 534 the Court said:

"The grounds for discussion under the statutes that were not cut away by the decision upon the demurrer (referring to the decision in *Loewe v. Lawlor*, 208 U. S., 274, 283) have been narrowed

still further since the trial of the case of *Eastern States Retail Lumber Dealers Assn. v. United States*, 234 U. S., 600. Whatever may be the law otherwise, that case establishes that irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair' dealers manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman Act, *if it is intended to restrain and restrains commerce among the states.*" (Italics ours.)

This qualification satisfactorily distinguishes the case and all others like it from the case at bar.

(1) The cases indicate that price control and price fixing in any industry may constitute the purpose of a combination effected through the instrumentality of an association or by other means. When the purpose is price fixing and the purpose is accomplished by any means, it is illegal.

The purpose of an association or combination may simply be to increase the profits of the members, but if this laudable purpose is to be attained by means of controlling or fixing prices of any commodity and prices are so fixed and commerce is thereby directly and unreasonably restrained, the restraint is illegal. Thus considered, either as a purpose or as a means—price fixing when its effect is unduly to restrain trade is illegal.

Lowry v. Tile Mantle & Grate Assn., 98 Fed., 817, 825 (C. C. N. D. Cal., 1899);

Wheeler Stengle v. Nat. Window Glass J. Assn., 152 Fed., 864, 873;

Chesapeake & Ohio Fuel Co. v. United States, 105 Fed., 93, 104 (1900), C. C. S. D., Ohio, affd. 115 Fed., 610 (6th C. C. A., 1902);

United States v. Jellico Mountain Coal Co., 46 Fed., 432, 435 (C. C. Tennessee, 1891);

Gibbs v. McNeeley, 102 Fed., 594, 599, 600 (1900); 107 Fed., 210 (1901); 118 Fed., 120, 127 (9th C. C. A., 1902);
U. S. v. American Column & Lumber Co., 263 Fed., 147, 156 (D. C. Tenn., March, 1920; affirmed by Supreme Court, Dec. 19, 1921);
State v. Adams Lumber Co., 81 Nebr., 392, 423 (1908).

(2) So a purpose to prevent sales directly from wholesalers to the consumers or limiting or restricting sales to one or more classes of persons necessarily involves a purpose to interfere with a natural process of trade and when effective by whatever means is illegal.

Montague & Co. v. Lowry, 193 U. S., 38, 45;
Retail Lumber Dealers' Assn. v. Mississippi, 95 Miss., 337, 345 (1909); *aff'd sub nom. Grenada Lumber Co. v. Mississippi*, 217 U. S., 433, 440, 441 (1910);
Cleland v. Anderson, 66 Nebr., 252, 263, 264 (1902);
United States v. Coal Dealers Assn., 85 Fed., 252, 264 (1898);
Mines v. Scribner, 147 Fed., 927, 928, C. C. S. D., N. Y. (1906);
Straus v. Bobbs Merrill Co., 210 U. S., 339, 350;
Straus v. American Publishers' Assn., 231 U. S., 222, 235 (1913);
United States v. Southern Wholesale Grocers' Assn., 207 Fed., 434, 440, D. C., Ala., 1913;
Eastern States Lumber Dealers' Assn. v. United States, 234 U. S., 600, 608 (1914);
National Harness Mfgs.' Assn. v. Federal Trade Commission, 268 Fed., 705, 712 (6th C. C. A., 1920).

(3) Agreements which limit production or output obviously restrain trade and where the other elements, such as the directness of the restraint upon commerce and its unreasonable effect thereon are present, such agreements are illegal.

State ex inf. Atty. General v. Arkansas Lumber Co., 169 S. W., 145, 159, 175 (1914);
Gibbs v. McNeeley, 102 Fed., 594, 599, 600, 107 Fed., 210, 118 Fed., 120, 127 (9th C. C. A).

(4) And the same is true of agreements whereby customers are apportioned or territory divided among competitors with the agreement that some dealers will restrict their activities and sales to specified customers or to a restricted territory and will not compete as to customers not allotted or territory not assigned.

State v. Adams Lumber Co., 81 Nebr., 392, 423;
Addyston Pipe & Steel Co. v. United States, 175 U. S., 211, 241;
United States v. Standard Oil Co. of New Jersey, 221 U. S., 1, 77.

But where as here there has been no price fixing, no prevention of sales from producer to the consumer, no curtailment or limitation upon production and no apportionment of customers or division of territory an association formed for the mutual protection of its members, even where the means adopted to achieve this legitimate end are far more drastic than any adopted in the case at bar, is obviously lawful.

Anderson v. U. S., 171 U. S., 604, 616;
Hopkins v. U. S., 171 U. S., 578, 592, 600;
Gladish v. Stock Exchange, 113 Mo. Ap., 726;

- Reynolds v. Plumbers Material Protective Assn.*, 63 N. Y. Supp., 303, 308, 309; ap. dismissed 169 N. Y., 614 (1902);
- Montgomery, Ward & Co. v. South Dakota Retail Mer. Hardware Dealers Assn.*, 150 Fed., 413, 418 (8th C. C. A.);
- Bohn Mfg. Co. v. Hollis*, 54 Minn., 223, 234, 235;
- Nat. Fireproofing Co. v. Mason Builders Assn.*, 169 Fed., 259, 265, 270;
- Natl. Protective Assn. v. Cummings*, 170 N. Y., 315, 328;
- People ex rel. Burnham v. Flynn*, 114 A. D., 578, *affd.* 189 N. Y., 180;
- Roseneau v. Empire Circuit Co.*, 131 A. D., 429, 432;
- Park & Sons Co. v. Nat. Druggists Assn.*, 175 N. Y., 1;
- State v. Duluth Board of Trade*, 107 Minn., 506, 520;
- Dickinson v. Board of Trade of Chicago*, 114 Ill. Ap., 295, 305.

The facts in the case at bar, considered in the light of the foregoing decisions, show that the actual purposes and objects, as well as the ostensible purposes for which the Board of Trade was formed, were entirely lawful, and as will presently appear, none of the means by which the desired ends were to be accomplished were illegal.

Resuming our analysis of the petition and again referring to Paragraph 42 thereof (R. 11), after taking pains to allege that the Board of Trade was formed for the purpose of enabling its organizers "to control prices" and to dictate the terms upon which they would transact business, one would naturally suppose that it would be alleged that pursuant to this purpose prices were fixed and controlled.

But there is no such allegation anywhere in the petition.

In this same paragraph it is declared that the articles of the Board are described as Exhibit A and in Paragraph 22 (R. 7) the articles are also so described and the by-laws identified as Exhibit B. By Paragraph 42 $\frac{1}{2}$ three forms of contracts are described as Exhibits A, B and C and these exhibits now form a part of the second supplemental Record (pages 160 to 176).

In Paragraph 43 (R. 12) it is alleged that during the early part of the year 1919 plaintiff's business had grown to such large proportions and had become so successful and profitable that this alleged fact became known to all of the defendants, and that prior to September, 1919, plaintiff was procuring for use in his picture houses and upon his alleged circuit programs from the defendants Pathe Exchange of New York and of Nebraska, First National Exhibitors Circuit, A. H. Blank and Famous Players-Lasky Corporation.

This allegation is so embellished with descriptive matter that it is not clear whether it is intended to allege the simple fact as we have described it, or whether it is intended to charge that plaintiff was procuring the programs from the defendants named from beyond the State.

At any rate the allegation is not that plaintiff did receive product from these defendants from beyond the State, and the previous allegations (R. 3 as to Pathe; R. 4 as to Blank and First National; R. 4 as to Famous Players) show that each defendant named had and maintained a branch office at Omaha.

The plaintiff continues his allegation (Par. 43, R. 12) by saying that he was frequently solicited by representatives of other defendants who were also members of the Board of Trade for a share of his business, and because of his failure to deal with these other defendants a spirit

of hostility was aroused upon their part toward the plaintiff and great pressure was brought to bear by them upon those defendants with whom plaintiff was dealing to compel them to cease doing business with the plaintiff.

From this involved allegation it appears that there must have been and was keen and active competition between the defendants to trade with him, so active that according to the plaintiff, "great pressure was brought to bear" upon those with whom he was dealing to induce them to cease dealing with him.

We do not know how issue can be joined on such an allegation or what proof could be tendered under it, but in any event standing by itself it appears to amount to nothing.

We now approach that part of the petition which undertakes to set out and charge the particular alleged conspiracy of which the plaintiff complains.

In Paragraph 43 (R. 12) the plaintiff charges that in August, 1919, all of the defendants, wrongfully and contrary to the act of Congress, combined and conspired in restraint of trade and commerce among the several States "with the purpose and intent of preventing plaintiff from carrying on his said business and from continuing therein and with the intent and purpose to ruin plaintiff in his business and his credit and reputation."

This allegation fixes the purpose and object of the alleged conspiracy as one to ruin the plaintiff in his business credit and reputation.

At the trial, evidently beginning to realize that it would be difficult to show that a conspiracy formed solely for the purpose of ruining a man in a purely local business could in any way restrain interstate trade and commerce, the plaintiff attempted to enlarge the scope of the supposed conspiracy by alleging (R. 12): "And with the intent and purpose of monopolizing or attempting to monopolize and for the purpose of acquiring the power to monopolize the business of distribution and lease or

sale within the territory comprised in this zone of picture film programs."

These legal conclusions, which the facts previously set out by the plaintiff tended to contradict and refute, were presently to be superseded by a so-called second amendment (R. 12) which begins: "And of eliminating the competition of plaintiff and of acquiring the business and profits of plaintiff for themselves and with the intent and purpose of monopolizing or attempting to monopolize and for the purpose of acquiring the power to monopolize the business of distribution and lease or sale within the territory comprised in this zone of picture film programs by means of the system of zones described in other parts of this petition together with the Omaha Film Board of Trade which combined all of the distributors in the zone within which plaintiff had been placed by defendants as more fully described in other parts of the petition, which acts had the effect of and tended to monopolize the business of distribution within this zone and placed it within the power of defendants to monopolize the moving picture industry in this zone."

This allegation is almost if not entirely unintelligible.

Treated in the light most liberal to plaintiff perhaps it may be regarded as expanding the objects and purposes of the conspiracy as originally alleged, which was confined to the purpose to ruin plaintiff's business, to one which had for its object the monopolization of the film distributing business in the so-called Omaha zone.

But this supposed purpose is obviously a mere afterthought grasped at by the plaintiff at the trial in his final effort to allege anything in an effort to avert a direction or a dismissal.

The pleader apparently forgot in his extremity that about four pages of the record, pages 3-6, inclusive, were devoted to a description of the separate character of the business conducted by each defendant and that it had been specifically pleaded with exceptional pre-

ciseness (R. 7) that the Board of Trade "was incorporated to carry out the objects and purposes set forth in the articles of incorporation." An inspection of these articles, as we have shown, indicates only a lawful purpose entirely removed from the sinister implications which the plaintiff sought by this amendment at pages 12-13 of the record to interject into the petition.

These conclusions certainly cannot overcome the natural inferences which can alone be drawn from the few plain allegations of fact contained in the petition.

Besides, it is obvious that plaintiff's conception of a monopoly and the way to establish its existence is first to sue every company conducting the same kind of business in a given locality and then allege that there is a monopoly because product cannot be obtained from any other source.

The obvious simplicity of such a course has evidently found favor with the plaintiff and plaintiff has not bothered to allege any facts which indicate that the defendants have done any of the acts by which a real monopoly of any industry has in the past been attained.

For example, even the plaintiff does not claim that one or more of the defendants controlled the others through common stock ownership or through the terms of any agreement under which monopolies in the past have been established and maintained, as, for example, by price fixing or a division of territory. (See *Addyston Pipe & Steel Co. v. United Staes*, 175 U. S., 211, 237.)

Nothing is charged except that product could not be obtained except through the defendants, which, while not the fact, is solely relied upon as establishing the existence of a monopoly.

To strengthen these obviously inadequate allegations mysterious reference is made to the so-called zoning system of the defendants, and it is sought by implication and atmosphere to breathe the suggestion of illegality into

the case rather than to allege facts in issuable form which charge anything illegal.

Of course, zones may be created for the purpose of fixing prices, in which event the purpose would be illegal. They might be established to enable the defendants to apportion territory among themselves, some defendants agreeing to operate in some zones and to refrain from operation in others, which would also be illegal. Or the establishment of zones might be an absolute essential for the efficient conduct of the business, as is so in the case at bar.

But there is not a single allegation of fact in the petition which indicates that the establishment of zones in the case at bar had any sinister or ulterior purpose, and the facts which are pleaded show clearly that without the so-called zoning system the business could not be conducted with any degree of efficiency. Imagine the absurdity of having to order films from New York or San Francisco for a one day's exhibition in Central Nebraska under a rental involving only a few dollars.

There is an allegation (par. 44, R. 12) the substance of which was perhaps intended as a charge that by means of the zone system "described in other parts of the petition," a monopoly, an attempted monopoly, and the power to achieve monopoly of the film distributing business in Nebraska was rendered possible and was actually achieved. We say that "perhaps" this was intended to be charged because the allegation as made is quite unintelligible and we hesitate to attribute any meaning to it.

But the other parts of the petition show that the so-called zone system was not remotely connected with the plaintiff's ability to obtain films locally from Omaha or from other adjacent or nearby exchanges. Evidently before the thought about the zones occurred to the plaintiff he claimed in paragraph 41 of his petition (R. 10) that "it frequently became necessary in order to supply

the demands of the plaintiff in that regard for the said defendants to procure at points outside of the State of Nebraska moving picture films * * * which plaintiff desired to exhibit at some or all of his moving picture theatres * * *," so that apparently the plaintiff experienced no hardship and there was no restraint of commerce whatever because of the so-called zone system.

Referring to a complaint somewhat similar to the one in the case at bar, in the case of *Arkansas Brokerage Co. v. Dunn & Powell*, 173 Fed., 899, 900, 903 (8th C. C. A., Oct., 1909), Circuit Judge ADAMS said:

"While the bill of complaint and argument of plaintiff's counsel abound in repeated and diversely stated charges of confederacy, conspiracy and unlawful contrivances to bring about the destruction of the plaintiff's business and to appropriate it by the defendants, the proof as we gather it from a patient and careful reading of the record discloses but few actual and material facts. The five jobbers undoubtedly conceived a purpose to save the brokerage charges which they had before then been required to pay, by negotiating their purchases through their own agency and at the same time inaugurate and conduct another branch of business.

By reason of their advantageous situation as jobbers who furnished a large part of the brokerage business of Pine Bluff and by dint of business sagacity and industry, their new brokerage company was able to outstrip most of its competitors, including the plaintiff, and as a result the latter soon abandoned its branch office in Pine Bluff and ceased doing business there. There is little, if any, competent evidence of unfair competition by the brokerage company, unless it be in the fact that it secured the trade of its own stockholders and availed itself of their valuable influence for the extension and success of its business. To pronounce such action unfair and unlawful would disrupt many existing business corporation and effectually prevent the organization of any more. It would

contravene one, if not the chief, reason for their creation or existence * * *

If the new expedient affected interstate commerce at all, it was not in that direct, immediate or necessary way which alone would make it obnoxious to the law, but only in an indirect, incidental and unimportant way not within the denunciation of the law * * *. Free competition is the life of trade and commerce, and it is quite as important to approve all lawful, fair and reasonable expedients devised to promote individual success as it is to condemn vicious and unlawful practices which violate individual right and the public weal."

The plaintiff has endeavored to allege a conspiracy among the defendants to restrain interstate trade and commerce in motion picture films as a result of which plaintiff was injured.

But an entirely different state of facts is actually set forth.

The only purpose and object of the conspiracy which may be said to be well pleaded is the charge that defendants conspired to ruin the plaintiff's business and not to restrain interstate trade or commerce.

True, the expression, "in restraint of trade and commerce among the several States" (Petition, par. 44, B. 12) is used, but these expressions are mere conclusions of law (*Witherill & Dobbins Co. v. United Shoe Manufacturing Co.*, 267 Fed., 950, 955, 1st C. C. A., June, 1919, rehearing Nov., 1920), and it appears not alone from this particular allegation but from the petition as a whole, that the gist of the complaint is the alleged conspiracy to ruin the plaintiff's business, while neither the purpose alleged in its relation to the other facts pleaded by the plaintiff nor any of the means by which it is supposed to have been accomplished, are illegal or could have imposed any unlawful restraint upon interstate trade or commerce.

It is, of course, elementary that in all conspiracy cases either the purpose and object of the conspiracy must be illegal or the means by which a lawful object is sought to be attained must be unlawful, otherwise there is no offence.

No facts showing any purpose to restrain interstate commerce are alleged.

The purpose alleged is to ruin the plaintiff's business by the means set forth.

The facts alleged show that each of the corporate defendants other than the Board of Trade had a business in Nebraska which each had a right to protect, and it sufficiently appears that all the Board of Trade did was to notify its members that in its judgment the plaintiff was not entitled to be regarded as an exhibitor in good standing because he sub-rented the films of some of the defendants without their authority.

The chief charge against the other corporate and the individual defendants is that they refused upon any conditions to supply him with pictures to be sub-rented by him to other exhibitors, and that they qualifiedly declined to supply him with films at his own theatres so long as he remained in bad standing with the Board of Trade.

We do not dispute that a conspiracy to ruin a man's business is by itself an unlawful purpose, because without a fuller statement of facts such a conspiracy implies malice and evil intent.

A conspiracy to injure a man's business without any just cause, such as an injury that is not an incidental effect of promoting the legitimate interests of the members of a combination, is a conspiracy to inflict a malicious injury on another both at common law and under statutes which make it an offense maliciously or wilfully to injure another in his business.

12 C. J., 569, N., 75, 76, 77, 78;

Council of Defense v. International Magazine Co., 267 Fed., 390, 411 (8th C. C. A., May, 1920).

But the authorities recognize the converse of the proposition that several persons conducting independent business enterprises may combine to promote their individual interests by any means not unlawful, and the fact that as a result of the promotion of their interests by legitimate means, a business rival is impoverished or driven out of business, imposes no legal liability upon them and gives the injured competitor no cause of action.

12 C. J., 569 N., 79;

State v. Stockford, 58 Atl., 769, 772;

State v. Huegin, 85 N. W., 1046, 1063;

Montgomery, Ward & Co. v. South Dakota

Retail Merchants Hardware Dealers'

Assn., 150 Fed., 413, 418; C. C. S. D., 1907;

McCaully Bros. v. Tierney, 19 R. I., 255, 263;

Cote v. Murphy, 159 Pa. St., 420;

Bohn Mfg. Co. v. Hollis, 54 Minn., 223, 234-

235;

National Fireproofing Co. v. Mason Builders

Assn., 169 Fed., 259, 265-270; 2nd C. C. A.

1909;

National Protective Assn. v. Cummings, 170

N. Y., 315, 328;

Vegelahn v. Guntner, 167 Mass., 92, 98;

Whitwell v. Continental Tobacco Co., 125 Fed.,

454, 460, 8th C. C. A. (1903).

As was said in *American Steel Co. v. American Steel & Wire Co.*, 244 Fed., 300:

"The defendant had a perfect right, for instance, as far as the Sherman Act goes, to undersell the plaintiff in ordinary business competition, or for the purpose of putting the plaintiff out of business. It had no right to do so as part of a plan to drive everybody out of the trade in order to obtain a monopoly for itself, which is what is alleged. * * *"

In *Dunshee v. Standard Oil Co.*, 126 N. W., 342, 344, the Supreme Court of Iowa said:

"The gist of appellee's complaint is that the appellants entered into a conspiracy to do an unlawful act, and that in pursuance of such conspiracy they did, by unlawful and malicious acts, destroy the appellee's business. It is the rule in this State, as well as the general rule, that a conspiracy is not actionable unless something is done in pursuance thereof which, without the conspiracy, would give the right of action. * * * This being true, before the plaintiff was entitled to recover in this action, he must show that some act was done by the defendants after the conspiracy was formed which was not only unlawful, but an invasion of his legal rights. It was not enough to show that his legal rights were interfered with; he must go farther and show that such interference was caused by the unlawful acts of the defendants. Legitimate competition in trade is both lawful and desirable, and such competition justifies the use of all lawful and fair means to gain the trade that would otherwise go to a competitor in business. * * *. Any legal act done to accomplish real benefit to the actor is not actionable, no matter what the motive. But the trend of recent authority is to the effect that if one, with the 'sole and malicious purpose of injuring another and without any benefit, interest, or pleasure * * * to himself or others, commit an act which, if done in good faith, would be justifiable, he is liable in an action in favor of such other person for the damages he may have sustained therefrom.'"

See also

Doremus v. Hennessy, 176 Ill. Rep., 608, 615;
Transportation Co. v. Oil Co., 50 W. Va., 611,
 624;

Walker v. Cronin, 107 Mass., 555, 564;

People ex rel. Burnham v. Flynn, 114 App. Div., 578; *aff'd* 189 N. Y., 180;

Roseneau v. Empire Circuit Co., 131 App. Div., 429.

As it appears, that, although by itself the charge that the defendants conspired to ruin the plaintiff's business might constitute an illegal purpose, yet when stated in conjunction with facts which show that the ruination of the plaintiff's business was not the purpose of the alleged concerted action of the defendants, it becomes clear that, even if ruination of the plaintiff's business resulted from the acts of the defendants in the protection of their own business, if these acts were lawful, the ruination of the plaintiff's business became and was a mere incident of a lawful purpose, executed by lawful means and results in no cause of action against the defendants.

Moreover, since it appears that even if everything alleged in the petition were true, no purpose or object unreasonably and directly to restrain interstate commerce has been shown, the means by which the supposed conspiracy is alleged to have been attained must not only be illegal, but they must directly and unreasonably restrain interstate trade and commerce, otherwise there is no cause of action.

The means used to effect what in reality was the lawful object of the defendants, namely, the protection and preservation of their own business, which plaintiff prefers to describe as a conspiracy to ruin his business, are each and all of them lawful.

1. The first means set forth consists in the alleged statement of certain of the defendants, that unless the plaintiff gave such defendants a considerable share of his patronage such defendants "would put him out of business and 'would bust him up in business'" by starting an exchange at Holdridge, Nebraska, and would supply

films to all of the theatres of which plaintiff's said circuit was composed by underbidding the plaintiff and would deprive him of the business of such theatres by the means alleged and that this threat was followed by an effort on the part of such defendants to put the plaintiff out of business "by offering to supply the theatres on said circuit, picture films at a discount" (Pet. Par. 41, R. 10, 11).

This charge is in reality a mere threat of competition by lawful means in which, according to the plaintiff, the defendants failed. The plaintiff enjoyed no special right or immunity from lawful competition. Hence merely to apprise the plaintiff of the approaching competition is certainly not illegal even if the means including the obviously legal act of supplying films to the plaintiff's customers at a discount.

Citizens Light, H. & P. Co. v. Montgomery L. H. & P. Co., 171 Fed., 553, 560;

National Protective Assn. v. Cummings, 170 N. Y., 315, 330;

Park & Sons Co. v. National Druggists Assn., 175 N. Y., 1, 20.

"* * * When a man purposes to do something which he has a legal right to do, there is no law which prevents him from telling another who will be affected by his act of his intention" (*National Protective Assn. v. Cummings, supra*).

See also

Virtue v. Creamery Package Co., 227 U. S., 8, 35.

There is, therefore, no illegality apparent in the first charge made against the defendants.

2. It is said that the defendants who were members of the Board of Trade caused false charges to be made against the plaintiff before the Board, and that the

Board without notice and without affording him an opportunity to be heard placed his name upon a so-called blacklist or bluelist of the Board and thereupon each member of the Board of Trade was notified thereof and that thereafter each defendant who was then a member of the Board or affiliated therewith "*at once ceased and refused to transact any further business with the plaintiff*" and that those defendants who were not members of the Board learned of its action, approved of it and co-operated with the Board and "entered into and became a part of the said conspiracy against this plaintiff to ruin his business and his credit and reputation" (Pet. Par. 44, R. 13).

This charge and one similar to it when analyzed will be found to contain nothing illegal.

It is one of divided responsibility.

The responsibility for making false charges rests with those who are supposed to have made them.

The responsibility for the so-called blacklist was purely that of the Board.

The responsibility for the alleged refusal to deal rested with those who so refused.

(A) It is said that the charges were false. But there is no allegation that they were known to be false by those who made them and not even an allegation that they were maliciously made.

Those alone who made the charges are responsible for them, but even if the charges were false, no liability would result.

The test is, want of probable cause (12 C. J., 588 N. 28).

However malicious defendants may have been, if there was probable cause, no action can be maintained against them for the making of false charges.

Payson v. Caswell, 22 Me., 212, 223.

Here the plaintiff's own description of the situation, not only in his petition but in the opening statement of his counsel (R. 120), shows that there was not only probable cause, but the charge was true and whether the particular charge was or was not true is in reality immaterial since the plaintiff's chief contention now rests upon his claimed right to require the defendants to let him have their films for purposes of sub-rental.

If this claim is maintainable why should plaintiff stop here?

Why may he not demand the right to purchase the films of the defendants outright, although they are not for sale to anyone and never have been?

(B) The next part of this claim relates to the placing of the plaintiff's name upon a so-called blue or black list and the giving of notice that his name was on such list.

These acts were the acts of the Board of Trade and if they were illegal responsibility for them begins and ends with the Board. But the so-called blacklisting of the plaintiff was not illegal.

It must be borne in mind that the purpose of putting plaintiff's name on this list was not illegal. It was the same purpose which was sanctioned by this Court in

U. S. v. Hopkins, 171 U. S., 578;

U. S. v. Anderson, 171 U. S., 604;

Board of Trade v. Christie Grain & Starch Co., 198 U. S., 236;

U. S. v. Chicago Board of Trade, 246 U. S., 231.

It was not the purpose condemned by *Eastern States Retail Lumber Dealers' Assn. v. U. S.*, 234 U. S., 600.

The purpose was the protection of the business of the members of the Board and the offense with which the plaintiff was charged, namely, his persistence in an illegal and damaging practice and course of conduct on his

part in sub-renting the defendants' films without authority, warranted the penalty of placing his name upon the so-called bluelist and would have warranted and justified a concerted instead of a separate refusal to deal with him.

Moreover, the notice that plaintiff's name was on the Board's bluelist did not carry with it the threat or implication that those who dealt with the plaintiff, i. e., other distributors of motion pictures, would be blacklisted and nothing of the kind is alleged. The notice conveyed no such meaning, and could not have meant anything of the kind. The members of the Board who individually refused to deal with the plaintiff were all of the same class. They were all distributors. None of them were described as exhibitors. And it is not alleged that exhibitors who rented pictures from the plaintiff would not be served with pictures by the defendants if they continued to deal with the plaintiff. Consequently, when Pathé, for example, refused to deal with plaintiff, that refusal did not and could not have conveyed the implication or threat that if Vitagraph or Universal dealt with the plaintiff, Vitagraph and Universal would in turn be blacklisted. The members were free to do as they chose and to deal with delinquents notwithstanding their delinquency.

The mere existence of a trade dispute in a matter of this kind tends to show the *bona fides* of the acts of the Board and its members.

The lawfulness of publishing as "unfair" one with whom the defendants have a trade dispute, in furtherance of a lawful object depends upon whether the publication is construed as a threat that those who disregard it will in turn be made to suffer by the withholding from them of business relations by those making the publication.

If the publication is regarded merely as a request it is lawful, because those who have a legitimate grievance may use peaceable persuasion to induce his customers or

prospective customers to withhold their patronage from him in order to force him to adjust the grievance.

Allis-Chalmers Co. v. Iron Moulders' Union,
150 Fed., 155, 172 (C. C. Wis., 1906, SAN-
BORN, D. J.), modified 166 Fed., 45;
Goldfield Cons. Mines Co. v. Goldfield Miners
Union, 159 Fed., 500, 519;
Pope Motor Car Co. v. Keegan, 150 Fed., 148,
151.

So likewise a justifiable refusal to deal must not be confused with a boycott as that term is legally understood.

A boycott is much more than a mere voluntary refusal to deal, based upon a legitimate business reason.

A boycott has been defined as "an organized effort to exclude a person from business relations with others, by persuasion, intimidation, and other acts which tend to violence, and thereby force him, from fear of resulting injury, to submit to dictation in the management of his affairs."

Substantially to the same effect:

Casey v. Cinn. T. & O. Union No. 3, 45 Fed., 135,
143;
Coeur D'Alene Consolidated, etc., Co. v.
Miners Union, 51 Fed., 260, 266;
Toledo, etc., Co. v. Pennsylvania Co., 54 Fed.,
730, 738;
Thomas v. Cincinnati, etc., R. Co., 62 Fed.,
803, 818, 821;
Consolidated Steel & Wire Co. v. Murray, 80
Fed., 811, 825;
Hopkins v. Oxley Stave Co., 83 Fed., 912, 919
(8th C. C. A., 1897);
American Steel & Wire Co. v. Wire Drawers,
etc., 90 Fed., 608, 614;

Union, Pacific R. Co. v. Ruef, 120 Fed., 102, 105;

Allis-Chalmers Co. v. Iron Moulders Union No. 125, 150 Fed., 155, 173.

We are mindful that the term "boycott" has come to have a more enlarged sense since the memorable days of Captain Boycott. In those early days Captain Boycott and his wife were compelled by their irate Irish tenants "to work in their own fields themselves, in most unpleasant imitation of Theocritan shepherds and shepherdesses, and play out their grim eclogue in their deserted fields with the shadows of the armed constabulary ever at their heels" (McCarthy England under Gladstone, quoted in *State v. Glidden*, 55 Conn., 46).

There the intimidation was direct and the danger of physical violence immediate and unmistakable.

To-day the secondary boycott is far more injurious and insidious than the primary boycott.

The latter when "denatured" by the absence of violence, intimidation and other kindred means is lawful, while the former is illegal.

Duplex Printing Co. v. Deering, 254 U. S., 443
Rev. 252 Fed., 722.

(C) Finally, this second charge was doubtless intended as a claim that the defendants combined to refuse to deal with the plaintiff, and agreed jointly not to deal with him.

The charge is simply that the several defendants ceased and refused simultaneously to transact any further business with the plaintiff. No agreement among the defendants so to cease and refuse business relations with the plaintiff is alleged nor is there any allegation that any of the defendants coerced, threatened, intimidated or even persuaded others not to deal with the plaintiff (see Petition, Par. 44, R. 13).

Such allegations are the gist and essence, not only of a criminal charge, but of a complaint of the kind here involved and the absence of any allegation of an agreement of an unlawful kind among the defendants renders the petition fatally defective in this respect.

U. S. v. Piowaty & Sons, 251 Fed., 375, 377
(MORRIS, D. J., Mass., September, 1917).

Citing

U. S. v. Naval Stores Co., 172 Fed., 455, 460;
Patterson v. U. S., 222 Fed., 599, 631.

The facts show there was no combined refusal.

Every defendant acted for himself and there was no intimidation, threat, violence, coercion or even persuasion. Moreover, the refusal was not absolute; it was qualified.

It is admitted that each defendant refused to allow plaintiff to sub-rent its respective films, while all were willing to deal with him on the same basis that they dealt with others, namely, to rent him films for exhibition at any theatre owned or leased by him, provided they were assured that he would perform his contracts and not violate them.

The authorities show that an absolute refusal to deal, is lawful even when there is a combination and concerted action, amounting to what is sometimes loosely described as a primary boycott when the refusal to deal is in furtherance of the legitimate business interests of those who so agree and is not vitiated either by an unlawful purpose or by illegal means.

Montgomery, Ward & Co. v. South Dakota, etc., Assn., 150 Fed., 413, 418 (C. C. S. Dakota, Feby., 1907);

Whitwell v. Continental Tobacco Co., 125 Fed., 454, 460, 8th C. C. A. (1903);

- Bohn Mfg. Co. v. Hollis*, 54 Minn., 233, 234, 235;
Park & Sons Co. v. Nat. Druggist Assn., 175 N. Y., 1;
Bossert v. Dhuy, 221 N. Y., 342, 364-366;
Auburn Draying Co. v. Wardell, 227 N. Y., 1-12;
Duplex Printing Co. v. Deering, 254 U. S., 443-475, 477;
American Steel Foundries v. The Tri City Central Trades Council, 257 U. S., 184;
Truax v. Corrigan, 257 U. S., 312.

See particularly dissenting opinion of Mr. Justice BRANDEIS in the case last cited.

In *Montgomery, Ward & Co. v. South Dakota, etc., Assn. (supra)*, retail dealers agreed among themselves not to purchase any merchandise from wholesalers and jobbers who sold to catalog or mail order houses.

In so far as this decision sanctions an agreement among retail dealers not to deal with wholesalers or jobbers who sell to catalog or mail order houses it appears to be in conflict with *Eastern States Retail Lumber Dealers' Assn. v. U. S.*, 234 U. S., 600. The object and purpose of such an agreement, if effected upon a substantial scale, restrains trade. Hence, it is illegal even though the means, considered only as such, are undoubtedly entirely lawful.

The case at bar presents almost the converse of the situation condemned in the case of the Eastern States Retail Lumber Dealers' Association.

There a purpose to separate or to keep apart the wholesaler and the consumer was condemned.

Here the defendants have established direct relations between themselves as distributors and the exhibitor, the consumer in the industry, as their customers.

If the plaintiff is permitted to interject himself between the wholesaler and the consumer in the case at bar the very situation condemned by the Supreme Court in the *Lumber* case will be created, namely, the prevention or direct dealings between the producer or wholesaler and the consumer.

In the case of *Park & Sons Co. v. Nat. Druggists Assn.*, 175 N. Y., 1, 8, the plaintiff sought an adjudication that the resolutions, agreements, plans and modes for the conduct of the business of the sale of proprietary medicines by the National Wholesale Druggists Association are illegal and that an injunction issue restraining the members of the Association from continuing to make efforts to induce any manufacturer or proprietor of what is known as patent or proprietary medicines from adopting the rebate or contract plan for the sale of their goods or of continuing such plan if they had previously adopted it.

The matter in controversy had reference to the sale by manufacturers of those particular medicines or remedies covered by trade marks or patents which secure to the manufacturer or proprietor the exclusive right to manufacture and sell the same, at the manufacturer's own price and who may also adopt such plan for the sale thereof as he, in his judgment, may determine. At one time the sale of these goods was largely made through traveling sales agents who worked upon commissions and supplied the goods to the consumer or retailer. Later on they were sold largely through the druggists, but many of the manufacturers did not maintain a uniform price. They would supply goods to some of the wholesalers upon more favorable terms than to others, thus permitting large dealers to make a profit while a great number of the smaller druggists found the handling of proprietary goods unprofitable. This resulted in the organization of the defendant, which represented 90 per cent. of the wholesale jobbing trade of the United States. At a meet-

ing of this association a plan was adopted for the conduct of the business of the sale of proprietary goods which was in the form of a petition addressed to the proprietors asking them to fix a uniform jobbing price for fixed quantities, and also a selling price by the druggists which they were to agree to maintain and that the druggists should be allowed the difference between the jobbing and the selling price as their profit or rebate. A large number of proprietors consented to this arrangement. This arrangement continued for approximately ten years, when a committee to whom the Detroit plan, so called, had been referred, reported, among other things, the following: "That in order to strengthen and render this plan more effective it is respectfully recommended that proprietors accept orders for full quantities with rebate discounted only from regular houses recognized as belonging to the number who will faithfully observe the prices and conditions established by the manufacturers." This plan was acquiesced in by all the manufacturers. Plaintiff never acquiesced in this plan, but insisted on its right to sell goods at such price as it saw fit. Thereupon the manufacturers refused to sell to plaintiff and it was compelled to buy from other druggists.

In view of the decision of the Supreme Court in *U. S. v. Colgate*, 250 U. S., 300, we are not prepared to say that *Park & Sons Co. v. Nat. Druggist Assn.*, 175 N. Y., 1, was incorrectly decided.

In any event the only point of doubt results from the purpose which dominated that case to maintain a fixed resale price.

No such purpose exists in the case at bar and the value of the authority to us results from the determined and concerted refusal on the part of the members of the association there involved to deal with specified individuals, which refusal received the full sanction of the Court.

Other authorities confirm the right of individuals or single manufacturers to decline to deal when and as they choose.

- Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed., 46-48 (2d C. C. A., 1915);
- Greater New York Film Rental Co. v. Biograph Co.*, 203 Fed., 39, 40;
- U. S. v. Colgate*, 250 U. S., 300;
- Cudahy Packing Co. v. Frey & Sons*, 261 Fed., 65, 67 (4th C. C. A., July, 1919); 65 L. Ed. Adv. Ops., 523;
- Welch Grape Juice Co. v. Frey & Sons, Inc.*, 261 Fed., 68 (4th C. C. A., July, 1919, certiorari denied, 251 U. S., 551);
- Baran v. Goodyear Tire & Rubber Co.*, 256 Fed., 571, 572, citing;
- Virtue v. Creamery Package Co.*, 227 U. S., 8;
- American Sea Green Slate Co. v. O'Halloran*, 229 Fed., 77;
- Locher v. American Tobacco Co.*, 218 Fed., 447;
- Dissenting opinion of Mr. Justice HOLMES in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S., 373, 411.

One of the most recent and authoritative as well as one of the most interesting expressions sustaining the right of those in business to refuse to deal with those who for one reason or another prove objectionable or distasteful to them is found in *U. S. v. Colgate*, 250 U. S., 300.

It had long been recognized as the law that an agreement to maintain the re-sale price of an article of commerce as fixed and prescribed by the manufacturer, restrained or tended to restrain trade and hence was ille-

gal. (*Continental Wall Paper Co. v. Voight & Sons Co.*, 212 U. S., 227, 261; *Jayne v. Loder*, 149 Fed., 21, 27 (3rd C. C. A., 1906; *Standard Oil Co. v. U. S.*, 221 U. S., 1, 56-59; *Ford Motor Co. v. Union Motor Sales Co.*, 244 Fed., 156, 157 (6th C. C. A., 1917), *B. V. D. Co. v. Isaac*, 257 Fed., 709, 711 (6th C. C. A., Feby., 1919), and it had been decided repeatedly that the fact that the article which was the subject of such an agreement was copyrighted (*Bobbs Merrill v. Straus*, 210 U. S., 339; *Straus v. Amer. Pub. Assn.*, 231 U. S., 222), or the fact that it was patented (*Bauer v. O'Donnell*, 229 U. S., 1; *Straus v. Victor Talking Machine Co.*, 243 U. S., 490, 496; *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S., 502; *Boston Store of Chicago v. American Graphophone Co.*, 246 U. S., 8), or the fact that it was a secret process (*Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S., 373), did not alter the case or in any way affect the situation.

With the law in this condition the *Colgate* case came before the courts.

That company had, like many large concerns, built up a great trade and business in the articles manufactured by it.

It fixed and set a re-sale price upon its articles, and although it did not exact a positive agreement on the part of the jobber or retailer not to sell the articles for less than list price, it did announce that any jobber or retailer who did cut the prices fixed by it would be cut off of its list and would not be supplied in the future.

The judgment of the District Court in sustaining a demurrer to the indictment was affirmed in this Court.

That the absence of the agreement on the part of the jobbers and retailers was the vital point of distinction between the *Colgate* case and others relating to re-sale price maintenance is shown by the case of *U. S. v. A. Schrader's Son*, 252 U. S., 85, and still later cases where the rule previously stated was again reiterated.

The existence of a definite agreement, express or implied, which restrains interstate commerce is vital to the statement of a case under the statute. Not only the majority but the minority opinion of the Court in *Frey & Son v. Cudahy Packing Co.*, 256 U. S., 208, shows this to be so.

In the case at bar there is no allegation to the effect that the defendants agreed among themselves not to supply the plaintiff with films and the facts alleged give rise to no such agreement by implication.

As we have already shown, the allegation is that the defendants "at once ceased and refused to transact any further business with the plaintiff or to render him any further service * * * etc." (R. 13).

Even the dissenting opinion of Mr. Justice PITNEY in which Mr. Justice DAY and Mr. Justice CLARKE concurred does not minimize the necessity of an allegation that there was an agreement which restrained trade even though the proof might establish an agreement which was implied from the facts instead of an express agreement.

But no proof of either kind of agreement would be competent or admissible without a specific allegation that there was an agreement and as we have said no such allegation appears in the case at bar.

Certainly the vague and indefinite statements of the petition do not present the same grounds for holding that the facts stated are sufficient as an allegation of the existence of an agreement as was indicated in the dissenting opinion in the *Old Dutch Cleanser* case, *Frey & Son v. Cudahy Packing Co.*, *supra*, or by the Court in *Thomsen v. Cayser*, 243 U. S., 66, 85.

None of the re-sale price maintenance cases, however, affect the case at bar except as they clearly recognize the right to refuse to deal.

The re-sale price maintenance cases illustrate attempts to retain the incidents of ownership in an article

of personal property after a completed sale of the article had been made, and it is this vice that renders agreements to maintain a fixed re-sale price illegal and not the incidental effect or consequence of breaching the agreement which results frequently in a refusal to deal with those breaching the agreement.

The case at bar is not one involving a sale of personal property and it is fundamentally different in this respect from those cited.

As the Court said in *U. S. v. United Shoe Mach. Co.*, 247 U. S., 32, 58:

" * * * He (referring to the owner of a patented article) cannot grant the title and retain the incidents of it (*Straus v. Victor Talking Machine Co.*, 243 U. S., 490; *Bauer v. O'Donnell*, 229 U. S., 1; *Motion Picture Patents Co. v. Universal Films Co.*, 243 U. S., 502), * * * see also *Boston Store of Chicago v. American Graphophone Co.*, 246 U. S., 8.

"The principle of them (the foregoing cases) was expressed to be that where an article has been sold it passes beyond the monopoly given by the patent and conditions cannot be imposed upon it. *Leases are not of this character; they do not convey the title. It is not contended nor could it be, that in this case they are a disguise for something else, artifices to convey the machinery and yet keep it subject to the patent right and its exercise. It therefore follows that conditions may be imposed.*" (Italics ours.)

This case establishes the fundamental difference between the rules applicable to sales of personal property and to leases, and the fact that the Justices stood four to three on the questions decided (two Justices not sitting) does not impair its strength as a decision on this issue, because the dissents were based primarily upon the conclusion that the United Shoe Machinery Co. was a monopoly. Having reached that conclusion, it is quite clear

that no device would save the combination from the condemnation of the dissenting Justices. It is, moreover, interesting to note that the character of the restrictions contained in the *Shoe Machinery* case were infinitely more stringent than the single covenant against sub-rentals in the case at bar.

Here the covenant against sub-rental is no more than is necessary to enable the defendants to enjoy the copyright grants to their several licensors.

And the protection of that right in no way promotes monopoly or contributes to any restraint of trade.

Without the ability to enforce the prohibition against sub-rental, the copyright estate is worthless, for there is then no means by which to conserve it from dissipation and destruction by promiscuous and entirely uncontrolled exhibition of the copyrighted subject in violation of the exclusive grant to the copyright proprietor.

See, also, *Standard Oil Co. v. Federal Trade Commission*, 273 Fed., 478, 481, 482 (2nd C. C. A., May, 1921) and *Coco Cola Co. v. Butler* (D. C.), 229 Fed., 224.

In *Bossert v. Dhuy*, 221 N. Y., 342, 364-366, the right of a labor union and of the members to refuse separately and collectively to work on non-union made material was upheld,

"subject to there being no malice, fraud, violence, coercion, intimidation or defamation in carrying out their resolutions and orders."

At page 365 the Court said:

"There is a material difference in the power of an association so far as it affects its primary or secondary interest. Where the acts of an employee or employees in their individual or associate capacity are reasonably and directly calculated to advance lawful objects, they should not be restrained by injunction.

"A strike or boycott may be legal or illegal according to the acts involved therein (*Gray v. Build-*

ing Trades Council, 91 Minn., 171; *State v. Van Pelt*, *supra*; *Gill Engraving Co. v. Doerr*, 214 Fed. Rep., 111; *Mills v. U. S. Printing Co.*, 99 App. Div., 605; *affd.* 199 N. Y., 76. See, also, opinion of ANDREWS, J., in *Seubert, Inc., v. Reiff*, 98 Misc. Rep., 402), so an action for a direct and primary purpose in the interest of individuals or a combination of individuals taken in good faith to advance the interests of the individuals or combination may be lawful, while a remote and secondary action which carries with it a degree of malice as a matter of law is illegal. In the case now before us if the defendants had called upon the public generally to discontinue using the plaintiff's material and had sought to prevent all persons by communications, written or otherwise, from dealing with the plaintiffs, their acts would have been illegal."

And there is nothing in *Auburn Draying Co. v. Wardell*, 227 N. Y., 1-12, which in any way modifies this rule.

The Court in that case said that there was an "inescapable distinction" between the two cases.

The latter case held the secondary boycott to be illegal while both recognized as lawful the so-called primary boycott when not effected by unlawful means and when consisting only of a direct concerted withdrawal of patronage and refusal to deal.

This is also the meaning of the decision of this Court in *Duplex Printing Co. v. Deering*, 254 U. S., 443, 466, 475, 477.

In that case the prevailing opinion said in part:

"The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a 'secondary boycott,' that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('pri-

mary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it.

"As we shall see, the recognized distinction between a primary and secondary boycott is material to be considered upon the question of the proper construction of the Clayton Act."

The extracts from the Congressional Record quoted by the Court, showing the discussion of the subject before the Judiciary Committee when Section 20 of the Clayton Act was passed, indicates clearly that the validity of the primary boycott so-called, was generally conceded.

The cases all show that mere persuasion to do a lawful thing whether practiced separately by individuals or collectively by many is lawful and such persuasion does not become an illegal means simply because it is successful or because injury results from it.

In *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S., 184, this Court sanctioned the use of persuasion to induce a strike.

At page 208 the Chief Justice said:

"Is interference of a labor organization by persuasion and appeal to induce a strike against low wages under such circumstances without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects.

They have long been thus recognized by the Courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer.

He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair he was nevertheless unable to leave

the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employee, as to the share or division between them of the joint product of labor and capital. To render this combination at all effective employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious.

The principle of the unlawfulness of maliciously enticing laborers still remains and action may be maintained therefor in proper cases, but to make it applicable to local labor unions in such a case as this seems to us to be unreasonable.

The elements essential to sustain actions for persuading employees to leave an employer are first the malice or absence of lawful excuse and second the actual injury. * * *

The analogy between the case cited and the case at bar is very close. The charge is that there was a concerted refusal to deal with the plaintiff and it is claimed that such a refusal was unlawful, but it appears from the plaintiff's own showing that there was a substantial *bona*

vide trade dispute between the plaintiff and the defendants and that the defendants simply announced certain principles and policies under which they were prepared to do business, and certain trade abuses such as the unauthorized sub-rental and use of their films which they would not permit, and that these policies were entirely reasonable, were applicable to all alike and were not accompanied by any violence, fraud, coercion, misrepresentation or other wrongdoing and had no tendency either to induce a restraint of trade or to promote monopoly.

There is nothing in the complaint which charges any secondary boycott or anything condemned by the authorities.

An even later authority than the case of the *American Steel Foundries v. Tri-City Central Trades Council* last cited and one which demonstrates the same conclusion was decided by this Court on December 19, 1921. In this case, *Truax v. Corrigan*, 257 U. S., 312, the Court in condemning picketing held to involve violence and intimidation again upheld the legality of a concerted refusal to deal when not accompanied by violence or other wrong.

In declaring invalid a section of the Arizona revised statutes which restricted the State Court's right to grant injunctions and in overruling the decision of the Supreme Court of that State construing that statute, a majority of the Court said:

"It is to be observed that this is not the mere case of a peaceful secondary boycott, as to the illegality of which courts have differed and States have adopted different statutory provisions. A secondary boycott of this kind is where many combine to injure one in his business by coercing third persons against their will to cease patronizing him by threats of similar injury. In such a case the many have a legal right to withdraw their trade from the one, they have the legal right to with-

draw their trade from third persons and they have the right to advise third persons of their intention to do so when each act is considered singly.

The question in such cases is whether the moral coercion exercised over a stranger to the original controversy by steps in themselves legal becomes a legal wrong. But here the illegality of the means used is without doubt and fundamental. The means used are the libelous and abusive attacks on the plaintiffs' reputation, like attacks on their employees and customers. Threats of such attacks on would-be customers, picketing and patrolling of the entrance of their place of business and the consequent obstruction of free access thereto—all with the purpose of depriving the plaintiffs of their business."

See also the elaborate dissenting opinion of Mr. Justice BRANDEIS for a complete review of the subject.

See also *Beech-Nut Packing Co. v. Federal Trade Commission*, 264 Fed., 885, 889, 2nd C. C. A., 1920; modified January 3, 1922; *Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S., 441.

Some point is made that the defendants had no right to restrict the plaintiff in the purchase and sale of advertising matter to be used in connection with the films of the defendants.

There are occasional references to a refusal on the part of the defendants to supply the plaintiff with advertising material.

But since the advertising matter without the films to which the advertising relates would be worthless, it is plain that the advertising matter is merely incidental to the films themselves, and if the defendants had the right to refuse to supply plaintiff with the films they had the right to withhold advertising material as well.

We think *Federal Trade Commission v. Gratz*, 253 U. S., 421, 428, disposes of this suggestion.

In that case the Court held that a merchant had the

right to refuse to sell except in conjunction such closely associated articles as ties and bagging.

The relation between advertising matter which specifically deals with the subject of the motion picture to be exhibited is certainly much closer to the picture itself and to its rental than the combined sale of ties and bagging, and hence, as we have said, there is no merit in this contention of the plaintiff.

The foregoing authorities establish beyond dispute the right of the defendants acting in concert to refuse to supply the plaintiff with any films for any purpose pursuant to a reasonable plan, calculated in their judgment to protect their own business interests.

3. It is next asserted (par. 44, R. 13) that the defendants caused notices to be sent to persons operating the various theatres comprising the Binderup Circuit, advising them that on and after the 15th day of September, 1919, it would be necessary for them to order their programs and service direct from the Omaha Exchanges, because all the exchanges had decided to discontinue supplying the Binderup Circuit with any programs, films, advertising matter or service and that later plaintiff was personally notified that the defendants would refuse to furnish him with programs or service at his own theatre at Minden.

The exhibitors who owned or operated the theatres upon the so-called Binderup Circuit were customers or potential customers of the defendants and the defendants had a right to notify them that if they wished to exhibit the pictures of the defendants, they must obtain them from the defendants and not from the plaintiff.

This is not the usual and common effort to prevent the wholesaler from dealing directly with the retailer or consumer.

Quite the contrary, Binderup more nearly occupied the position of a jobber who insisted upon dealing sur-

reptitiously in the goods of a wholesaler without his consent and upon re-letting or sub-leasing them to the primary consumer or retailer for exhibition to the public, contrary to the express prohibitions contained in the contracts of the defendants whose pictures were the subject of the transaction.

All that is charged here is that the wholesaler notified the retailer that Binderup was no longer authorized, if he ever had been, to sub-rent the pictures of the wholesaler and that the privilege of rental and exhibition could be lawfully obtained only from the wholesaler.

Economically, there is no room for a middleman such as the plaintiff aspired to be between the distributor and the exhibitor.

The absurdity of the plaintiff's claim that he could supply the defendants' pictures to the members of his so-called circuit 50 per cent. cheaper than the defendants could supply them is evident. If plaintiff could do this, it was only because he sub-let surreptitiously and applied the entire sub-rental to his own use.

We have seen that the producer generally consigns his pictures to the National Distributor for rental to the exhibitor and it is obvious that the interposition of another middleman, i.e., one between the distributor and the exhibitor, must necessarily enhance the rental price of the pictures to the exhibitor and serve no useful function whatever, and it would also destroy the vast selling organizations which the defendants in this case have built up.

The business of middleman between the distributing defendants and the exhibitor cannot, under the circumstances disclosed in this case, be regarded as a lawful business. It is lawful only when the defendants severally agree to it and each defendant was and is unalterably opposed to it. Each of the defendant distributors prohibited the sub-rental of their films by contract.

Hence, the contract being in every way a valid regulation of their own business, necessary for its continued existence, the films could not be sub-rented without violating the terms of these leases, in a vital and material respect.

Legally as well as economically, the presence of this additional middleman in the industry is entirely unjustifiable.

This attempt to create another middleman, namely, one between the distributor and the exhibitor, was tried on a substantial scale and has in at least two instances resulted in condemnation by the Federal Trade Commission.

Federal Trade Comm. v. Stanley Booking Corp., 1 Fed. Trade Dec., 212;

Fed. Trade Comm. v. Saenger Amusement Co., Complaint, 157.

A concern which neither owns nor controls the distribution of pictures but which negotiates rentals with one or more exhibitors is known as a booker.

In the *Stanley Booking Corporation* case the Commission found, among other things, that the company acted in the capacity of a booking agency "which agency procures and books moving picture films by means of contracts with various exhibitors of moving picture films on a commission basis, the said film being purchased and leased from the producing companies of moving picture films and film exchanges representing such producing companies." * * *

The Commission found (Par. 4):

"That the respondent Stanley Booking Corporation in the conduct of its business has employed and used the following unfair methods of competition * * * (d) By divers threats and different methods of intimidation has induced the owners

and operators of certain moving picture theatres to pay this respondent a sum equal to 10 per cent. of the cost of all moving picture films of various producers booked *directly* from said producers or exchanges."

The italics are those of the Commission and the significance of the word *directly* is that the Stanley Company only "booked" the pictures while the producers or exchanges controlled and upon request supplied the pictures to the exhibitors, so that as we have said the function performed by the Stanley Company was uneconomic and useless since the producers and distributors were ready to supply and the exhibitors were prepared to exhibit the picture, so that the payment of a booking fee of 10 per cent. to the Stanley Company was necessarily economic waste.

It was more than mere economic waste.

The practice tended to create and in the two cases cited did foster a variety of unfair practices, all of which tended to keep the distributor and the exhibitor apart, unless the exhibitor paid the Stanley Company a booking fee of 10 per cent. for bringing them together.

The plaintiff here aspired to this same kind of business, appropriating the entire sub-rentals instead of a modest booking fee to his own use but without the formality of any contract with the distributor which authorized it and in the face of contracts which expressly prohibited it.

The proceeding against the Stanley Booking Corporation resulted in an order which, among other things, required the Stanley Company to cease and desist from

"(D) Making threats and employing methods of intimidation to induce and compel owners and operators of moving picture theatres to pay it, the respondent, a sum equal to ten per cent. of the cost of moving picture films booked directly from the producer of said films or the film exchanges

or to pay to it, the respondent, any sums whatsoever on moving picture films booked directly from the producer of said films or from the film exchanges."

The defendants in the case at bar were well within their rights in what they did. They only notified exhibitors that their pictures could be lawfully obtained from them alone.

They had a right to do much more. They had a cause of action for copyright infringement against every exhibitor who exhibited their copyrighted films without their consent or authority.

The defendants would have been within their rights if they had so warned the exhibitors.

In *Citizens' Light, H. & P. Co. v. Montgomery L., H. & P. Co.*, 171 Fed., 553, 560, the Court said:

"At common law a trader, or person in other callings, in order to get another man's customers, could use any means not involving violation of the criminal laws, or amounting to 'fraud,' 'duress,' or 'intimidation,' as the law understands and applies those terms to transactions between man and man, or to his becoming a wrongful party to a breach of another man's contract. The trader may boast untruthfully of the merits of his wares, so long as it does not take the form of false statements, amounting to slander or willful misrepresentation of the quality of a rival product, or a libel upon the character, business standing and credit of his rival, or an effort to induce the public to believe that the product he sells is that manufactured and sold by the rival. He may send out circulars, or give information verbally, to customers of other men, knowing they are bound by a contract for a definite term, although acting upon the expectation and with the purpose of getting the trade of such persons for himself. He may use any mode of persuasion with such a customer, keeping within the limitations stated, which appeals to his self-interest, reason or even his prejudices. He may

descant upon the extent of his rival's facilities compared with his own, his rival's means, his insolvency, if it be a fact, and the benefits which will result to the customer in the future from coming to the solicitor rather than remaining where he is. He may lawfully, at least so far as his rival is concerned, cut prices to any extent, to secure his trade. So long as what he does is done to benefit his own trade, and, in taking over the customers of another, he keeps within the limitations heretofore defined, he is safe from legal restraint at the instance of a competitor in following 'the law of competition,' which takes little note of the ordinary rules of good neighborhood or abstract morality. The person whose customers are thus taken from him cannot complain, for no right of action lies in his favor against him who solicited his customer, since the solicitor exercised a legal right in a legal way, and the exercise of a legal right in a legal way, for a lawful purpose, will not give a cause of action."

Assuming the statement complained of was made and that plaintiff dealt only in the pictures of the defendants, viewed in its worst aspect it was only another way of saying that Binderup was about to retire or go out of business.

Viewed even in this light, it was true.

He was about to cease the business he had no right to continue without authority from the defendants.

Hence no liability could result from such a statement, even if it was made.

In those cases in which recovery has been had against those responsible for statements indicating that the plaintiff was about to go out of business, the element of falsity, malice and special damage are essentially present.

Here, as we have pointed out, the statement that Binderup would no longer be supplied with films for purpose of sub-rental, if made, was true, and hence there was and could have been no liability of any kind because of it.

4. The next charge (Par. 45, R. 14) is that about November 10, 1919, after he had been removed from the bluelist of the Board and after several of the defendants had offered to supply him with films and service and he had declined their offers, the defendants, in furtherance of the conspiracy to ruin the plaintiff in his credit and reputation and to destroy his business, caused further charges to be made against him before the Board of Trade, and again without notice or hearing plaintiff was placed upon the so-called blacklist or bluelist by the members of the Board and immediately thereafter he received notice from the defendants with whom he was dealing that they declined to make shipments of programs or give him further service.

This again involves the contention that plaintiff was unlawfully blacklisted by the Board of Trade and as a result that certain of the defendants refused to deal with him.

As already shown, even if the facts stated are true, no liability results, for the reasons already fully discussed.

5. It is also alleged (Par. 45, R. 14) that the plaintiff applied to several of the defendants for films and service, but that these defendants declined to trade with him and advised him that no further films or service would be supplied "until his name had been removed from the bluelist or blacklist by the members of the Omaha Film Board of Trade or by the Grievance Committee thereof."

This in effect is a charge that certain of the defendants notified him of a qualified refusal on their part to deal with the plaintiff.

Their declination is alleged to have been "until" his name was removed from the so-called bluelist.

Whether plaintiff's name would remain on the Board's bluelist depended entirely upon him. All that was required of him was that he would observe his contracts and deal fairly with the defendants.

The charge really is intended to be that the defendants refused to supply films for sub-rental to the so-called Binderup Circuit, for, as we have seen, every defendant was willing upon ordinary terms to supply him with pictures at his own theatre.

The charge when so understood has been fully answered by the foregoing argument and authorities which show that the defendants had the right of absolute refusal, hence no liability could result from its qualification that they were unwilling to deal until his name had been removed from the so-called bluelist of the Board of Trade.

This is especially so when the offence for which his name was placed upon the list is considered.

It was not there because plaintiff persisted in pursuing a course which he had a legal right to pursue.

It was there because he persisted, as his petition and present claim shows, to assert the right to sub-rent the defendants' pictures in the face of their express prohibition against sub-renting.

He had no right to require the defendants to revolutionize their business in order that he might profit at their expense.

He had no right to dictate to them the use to which he would put their pictures.

The plaintiff's whole claim is a misconception of the rights which he enjoyed and an effort to magnify the importance of transactions which in reality were trivial.

6. Complaint is made (Par. 45, R. 15) that about November 13, 1919, certain of the defendants as members of the Board, after full discussion in the presence of the plaintiff, adopted the following resolution:

"That Mr. Binderup be kept on the bluelist indefinitely and that he be not supplied with any service whatsoever as far as bookings for any house that does not actually and wholly belong to

him outright, and in reference to the houses that he claims belong to himself, that he sign affidavit showing what ownership he has in each house, and, further, that he be not supplied with any films whatsoever for his own use until he has deposited one thousand dollars in some bank or trust company subject to forfeit and check by the Omaha Film Board of Trade if at any time he shall violate any of the rules of this association," that plaintiff declined to comply with such conditions and that the defendants, in furtherance of the said conspiracy and contrary to the Act of Congress, "refused to have any dealings with the plaintiff."

This charge, like one of the former complaints, involves the legality of the so-called blacklisting of the plaintiff and of the defendants' qualified refusal to deal with him.

The resolution indicates the absolute refusal to deal as to theatres not actually owned by the plaintiff.

It discloses a qualified refusal as to theatres which the plaintiff claimed to own.

At first impression the conditions imposed may seem severe and perhaps arbitrary; but how else were the defendants to protect their property?

The defendants were dealing with a man who had a uniformly bad reputation among them as a "bicycler" and unauthorized sub-renter of their films.

They regarded him as a person who not only sub-rented their films without authority and appropriated the sub-rentals to his own use, but he constantly held films beyond the contract period, which subjected the defendants to serious consequences and imposed unjustly upon other exhibitors with whom the defendants could not perform their contracts to deliver the films thus improperly detained by the plaintiff (R. 57, 58).

The conduct of the plaintiff made him an undesirable, untrustworthy and dangerous customer. He was one

with whom anyone had ample reason to refuse to deal absolutely and under any circumstances.

And so it is of little consequence that the resolution in terms may appear harsh and under other circumstances unreasonable.

The defendants had the right to decline to deal with the plaintiff on any basis, and the facts show beyond contradiction that the refusal was based upon substantial, sensible business grounds and was not capricious, unreasonable or malicious.

The point becomes immaterial in the face of the allegation that the defendants were willing to deal with the plaintiff at his own theatre without the security described in the resolution.

7. It is charged (Par. 45, R. 16) that the defendants "caused unexpired contracts which he (plaintiff) held with some of the defendants entitling him to such programs and service to be illegally and unlawfully cancelled."

The conclusions add nothing to the charge.

Of course, to procure the breach of a valid existing contract maliciously and without just cause or by unlawful means is illegal and actionable.

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S., 229, 257;

Posner Co. v. Jackson, 223 N. Y., 325;

Carmen v. Fox Film Corporation, 258 Fed., 703 (D. Ct., S. D., N. Y., June 30, 1919; MANTON, C. J.); Reversed on other grounds, N. Y. Law Journal, Feb., 1921.

Westinghouse Electric & Mfg. Co. v. Diamond S. & F. Co., 268 Fed., 121, 123 (D. C. Del., March, 1920);

American Steel Foundries v. Tri-City Central Trades Council, 257 U. S., Dec. 5, 1921.

And this is so even though the contracts be terminable at will.

Truax v. Raisch, 239 U. S., 33, 38.

But nothing of the sort is alleged in the case at bar. If a breach of contract results from peaceable offers or from persuasion not tinged by any wrong such as intimidation, coercion or misrepresentation, made in the pursuit of a lawful and legitimate purpose, there is no cause of action for inducing the breach of a contract.

Expressed in different form, the law is that when the motive is not primarily to induce the breach but to promote competition or some other lawful purpose and the means are not tainted with fraud, coercion, intimidation or other illegality, even though a breach of contract results, it is not actionable.

Sperry & Hutchinson Co. v. Pommer, 199 Fed., 309, 314;

Citizens Light, H. & P. Co. v. Montgomery, etc., 171 Fed., 553, 560;

Amer. Law Book Co. v. Thompson Co., 84 Supp., 225;

Roseneau v. Empire Circuit Co., 131 A. D., 429.

As Judge LEARNED HAND said in *Triangle Film Corporation v. Artcraft Pictures*, 250 Fed., 981, 982 (2nd C. C. A., March, 1918):

"Nobody has ever thought, so far as we can find, that in the absence of some monopolistic purpose everyone has not the right to offer better terms to another's employé so long as the latter is free to leave. The result of the contrary would be intolerable both to such employers as could use the employé more effectively and to such employees as might receive added pay. It would put an end to any kind of competition. * * * That nobody in his own business may offer better terms

to an employé, himself free to leave, is so extraordinary a doctrine, that we do not feel called upon to consider it at large."

In the case at bar we do not know to what contracts the plaintiff refers, the breach of which is supposed to have been procured by the defendants.

It appears from his petition (R. 12, Paragraph 43) that at the time complained of by the plaintiff only three contracts existed between the plaintiff and any of the defendants.

Pathé Exchange of New York and of Nebraska may be treated as one and A. H. Blank Enterprises and First National Exhibitors Circuit are in this connection one.

To induce a person to cancel a contract in the manner provided in the contract itself for its lawful cancellation, is a very different thing from causing contracts to be breached.

8. Finally (Paragraph 46, R. 16), the plaintiff charges that in September, 1919, as part of the said conspiracy to ruin his business, credit and reputation, the Globe Film Company made representations to the various members of the Binderup Circuit and to operators of the theatres owned by plaintiff that the only service Binderup could supply would be of an inferior character and poor in quality, that they (presumably the defendants) proposed to start new and independent theatres in all good towns in which plaintiff controlled moving picture theatres, particularly in his home town, Minden, and further that the film exchanges at Omaha had declined or would decline to give plaintiff anything in films.

These statements are attributed to the defendant Globe Film Company. This defendant appears to have been a partnership (R. 6) not in any way connected with any of the other defendants.

That part of this charge which embodies a further threat of competition and the statement that the ex-

changes would decline to give the plaintiff anything in films was, considered in its most unfavorable aspect, nothing but a charge that the plaintiff was about to go out of business, and has already been fully discussed.

The only remaining charge is that the only service Binderup could supply to his alleged circuit would be inferior in character and poor in quality.

This charge, we assume, represents an effort to make it appear that the alleged statements disparaged the goods in which the plaintiff dealt and was for that reason actionable.

But the goods in which he had unlawfully dealt were not his goods.

They were the goods of the defendants, and his continued right to deal in them was dependent upon authority to be derived from them.

When this authority was lawfully withheld his business came to an end and ceased to exist, not because of any illegal act on the part of the defendants, but as the result of natural and lawful causes.

At most, only an action in the nature of one for slander or libel for the disparagement of goods dealt in by the plaintiff could result from this charge.

The case at bar is not such an action and is brought upon an entirely different theory.

The foregoing discussion is not the familiar and generally unsuccessful effort to avoid responsibility for a criminal conspiracy by a demonstration that the particular acts with which the defendants are charged, when dissected, separately appear to be lawful in themselves.

Swift & Co. v. U. S., 196 U. S., 396;

Loewe v. Lawlor, 208 U. S., 274, 298, 299;

Monarch Tobacco Works v. Amer. Tobacco Co., 165 Fed., 774, 780.

It is more than this, since we have shown that there was no unlawful purpose to restrain interstate commerce and commerce was not restrained.

Here there was no illegal purpose or object and hence, when we show, as we have, that each of the alleged illegal means by which the fancied conspiracy was to be made effective, was in reality entirely lawful, the plaintiff's case necessarily fails.

Thus we see that there is no substance in any of the plaintiff's claims.

There was no conspiracy which could have restrained or which did restrain interstate trade.

There was in fact no conspiracy to ruin the plaintiff's business, and if there had been without an actual and direct restraint upon and an unreasonable interference with interstate commerce the plaintiff would still have no cause of action cognizable by the Court below no matter what injury the defendants may have caused him.

There was only an effort on the part of the defendants to protect their own business against the harmful and illegal practices of the plaintiff.

And, as we have shown, the means by which the defendants sought to achieve their lawful aims were entirely lawful.

It remains only to be shown that in any event the corporate defendants are not liable for the acts of the Board of Trade or its members, and that plaintiff in reality sustained no damages recoverable in the action.

Not one of the corporate defendants was a member of the Board of Trade and not one of these had anything whatever to do with its officers or with any of the matters complained of in the petition.

It is not denied that these defendants knew that there was a Board of Trade at Omaha, nor is it denied that some of these defendants paid the dues of their Branch Members and encouraged their membership in what was on its face and in reality a lawful institution.

But none of these defendants took any active part in the Board's affairs and none of them undertook to direct or authorize their branch managers to do or to refrain from anything in connection with the plaintiff, and nothing of this kind is alleged.

Under such circumstances the corporate defendants cannot be made liable for the acts or omissions of their branch managers outside of the scope of their authority and duties.

Lawlor v. Loewe, 187 Fed., 522, 526;

Eagle Glass & Mfg. Co. v. Rowe, 245 U. S., 275, 280.

In *Lawlor v. Loewe (supra)*, LACOMBE, C. J., said:

"It has been argued here that the mere fact that any individual defendant was a member of and contributed money to the treasury of the United Hatters Association made him the principal of any and all agents who might be employed by its officers in carrying out the objects of the association and responsible as principal if such agents used illegal methods or caused illegal methods to be used in undertaking to carry out those objects. We cannot assent to this proposition. The clause of the Constitution of the United Hatters which provides that certain of its officers 'shall use all the means in their power to bring such shops (i. e., non-union shops) into the trade' does not necessarily imply that these officers shall use other than lawful means to accomplish such object. Surely, the fact that an individual joins an association having such a clause in its constitution cannot be taken as expressing assent by him to the perpetration of arson or murder. Something more must be shown, as, for instance, that with the knowledge of the members unlawful means had been so frequently used with the express or tacit approval of the association that its agents were warranted in assuming that they might use such unlawful means in the future, that the association and its individ-

ual members would approve or tolerate such use whenever the end sought to be obtained might be best obtained thereby."

So far as the opening statement of plaintiff's counsel is concerned, we deem it sufficient to point out that his statements showed affirmatively that the transactions complained of were all local and were not interstate in character (R. 112, 113), and hence that there was no cause of action. It made no difference what else he may have said.

The opening could not properly enlarge the scope of the allegations of the petition and since we have shown that the allegations of the petition were insufficient, it follows that no cause of action was alleged against the defendants.

The remaining paragraphs of the petition (R. 16-19) relate to plaintiff's alleged damage.

What was said by the Court in *Whitwell v. Continental Tobacco Co.*, 125 Fed., 460, 463 (8th C. C. A., 1903), is equally applicable to the case at bar and demonstrates that an additional essential element of recovery, namely, damages directly resulting from the facts charged in the petition does not exist in this case.

In the *Whitwell* case the Court said:

"There is another reason why the complaint in this action fails to state facts sufficient to constitute a cause of action: The sole cause of the damages claimed in it is shown to be the refusal of the defendants to sell their goods to the plaintiff at prices which would enable him to resell them with a profit. Now, no act or omission of a party is actionable, no act or omission of a person causes legal injury to another, unless it is either a breach of a contract with, or of a duty to, him. The damages from other acts or omissions form a part of that *damnum absque injuria* for which no action can be maintained or recovery had in the courts. The defendants had not agreed to sell their goods

to the plaintiff at prices which would make their purchase profitable to him, so that the damages he suffered did not result from any breach of any contract with him. They were not caused by the breach of any legal duty to the plaintiff, for the defendants owed him no duty to sell their products to him at any price—much less, at prices so low that he could realize a profit by selling them again to others. The complaint therefore fails to show that any legal injury or actionable damages were inflicted upon the plaintiff by the acts of the defendants and the judgment below is affirmed.”

POINT III.

There is no merit in the printed argument submitted in behalf of the plaintiff.

It remains for us to respond as briefly as possible to the argument of our learned opponents.

While plaintiff's brief displays much ability, ingenuity and industry, we regret to say that its value to the Court is greatly impaired and diminished by the numerous inaccuracies and the extravagant statements contained in it.

The facts stated in the brief are not the facts stated in the petition and at times it is difficult, if not impossible, to separate and distinguish statements which are in reality mere argumentative expressions of counsel in no way related to the petition, from statements of fact which is what they appear and purport to be.

We think it cannot be said that literary style and expression has in any way been sacrificed to accuracy of statement.

We feel that we have fully answered every contention which is legitimately presented by the facts alleged in the petition, and that all that remains to be done is to point out enough of the inaccuracies of plaintiff's coun-

sel to demonstrate that the statements made in the brief may not with safety be relied upon and to distinguish the comparatively few authorities relied upon by plaintiff to support his supposed case.

Although, as we have pointed out, we find no allegation in the petition that the defendants entered into any agreement among themselves to restrain trade or to ruin the plaintiff or even to refuse to deal with him, the existence of such an agreement is assumed in the brief and there are repeated references to it.

Thus at page 45 it is said:

"They entered into a common agreement not to sell to an individual, the plaintiff; they entered into a common agreement not to sell to a class, those operators of theatres who had any connection whatever with the plaintiff; they entered into a common agreement not to sell to operators who did not actually own the theatres in which they carried on their business; they entered into an agreement not to sell to plaintiff by which his trade was restrained both as an independent exhibitor on his own behalf and also as a broker or purchasing agent on behalf of members of his circuit."

We find in the petition no shadow of justification for these extravagant statements.

Paragraph 44 (R. 12) contains the charge that defendants "combined, confederated and conspired" in restraint of trade, but we do not understand that this is equivalent to an allegation that the defendants entered into an agreement among themselves to do or to refrain from doing anything.

And even if it were the same thing, what the petition says the defendants conspired to do was to ruin the plaintiff's business. And later in the same paragraph after alleging that false charges were made against the plaintiff and that he was put upon the so-called blue or black

list, "each and every one of the defendants * * * at once ceased to and refused to transact any further business with the plaintiff * * * " (R. 13).

This is certainly a long way from the statement of the fact alleged in the brief by plaintiff's counsel.

The statements (Brief, 13) to the effect that the films reached the plaintiff from theatres in other States, as well as the argumentative matter on pages 18 and 19, are not supported by anything alleged in the petition and are inconsistent with and in contradiction of the allegations of the petition.

Evidently satisfied that it had been demonstrated that the purpose of the alleged conspiracy was to restrain interstate commerce, the following summary of "the acts complained of as being illegal and done in furtherance of an illegal conspiracy" is attempted: (Brief, 9).

- (1) "Imposing upon the use of films the condition that they should be at all times subject to an arbitrary right of recall with or without reason."

The petition is quite silent as to this entirely new ground of complaint, and what illegality could possibly result from the control of the owner of his own property is beyond our comprehension.

- (2) "Imposing upon the use of films the condition that they should be used only in connection with advertising matter purchased from defendants."

There is nothing illegal in this, as we have already pointed out.

Federal Trade Commission v. Gratz, 253 U. S., 421, 428.

- (3) "Cutting prices in plaintiff's territory for the purpose of putting him out of business."

It is nowhere alleged that this was done.

The nearest approach to it is (Par. 41, R. 11) the alleged threat of one of the defendants to compete with the plaintiff by offering films to the plaintiff's so-called circuit members at a discount, and as we have shown, this was not illegal. If it had been alleged it would not have been illegal.

American Steel Co. v. American Steel & Wire Co., 244 Fed., 300.

- (4) "Coercing plaintiff to give orders to defendants, with whom he did not choose to deal."

There is no allegation that plaintiff succumbed to any coercion. The nearest approach to it is (Par. 43, R. 12) that the plaintiff "was frequently solicited" to deal with the defendants, with whom he was not then dealing. This is certainly a strange form of "coercion."

- (5) "Procuring breaches of contract by some of the defendants."

We find no such allegation in the petition. Such allegations as there are on this subject have already been sufficiently answered.

- (6) "Circulating a blacklist based on charges brought in bad faith for the purpose of crushing plaintiff, among both members and non-members of the organization (Film Board of Trade) employing that list."

As we have shown, the circulation of a blacklist considered only as a means is not illegal in the absence of an unlawful purpose and the absence of an unlawful purpose has been fully demonstrated. Notwithstanding the conclusions of the plaintiff that the purpose was unlawful, the facts show that what was done was done by the defendants in a *bona fide* effort to protect their own business.

- (7) "False and malicious representations concerning plaintiff made to persons doing business with plaintiff for the purpose of putting him out of business."

We can find no such allegation in the petition.

The nearest approach to it appears to be Paragraph 46, Record, 16, which is unimportant for the reasons already given.

- (8) "Threats to those doing business with plaintiff."

We find no allegation of this kind in the petition.

- (9) "Refusal to serve those who maintained any relations with plaintiff."

This is evidently an attempt to make it appear that the defendants not only refused to deal with the plaintiff but refused "to serve those who maintained any relations with the plaintiff," from which an illegal secondary boycott might be inferred.

But, again, there is no such allegation. On the contrary, it is affirmatively alleged (Par. 44, R. 14) that the defendants "caused notices to be sent to the persons operating the various moving picture theatres comprising the Binderup Circuit as aforesaid advising them that on and after the 15th day of September, 1919, it would be necessary for them to order their programs and service direct from the Omaha exchanges because all the exchanges had decided to discontinue supplying the Binderup Circuit with any programs, film advertising matter or service
• • •"

This allegation shows that those who had maintained relations with the plaintiff were sure of all of the product they could use directly from the defendants themselves and is somewhat far removed from a refusal to deal with those who dealt with the plaintiff.

- (10) "Coercing plaintiff to coerce others to abide by the rules or orders of an organization of which neither of them were members (the Film Board of Trade)."

This we confess we do not understand, but it is sufficient to point out that there is no allegation that plaintiff was coerced to do anything and hence no allegation that he was "coerced to coerce others."

- (11) "Imposing upon plaintiff the condition that he could conduct his business only in one theatre and requiring that one to be actually owned by him."

There is, of course, no allegation of this kind in the petition.

The alleged resolution described in Paragraph 45 of the petition (R. 15) is probably the supposed basis for this assertion.

But the resolution did nothing of the kind now charged and it appears therefrom that the resolution in no way affected his right to service at any number of houses if he owned them.

- (12) "Imposing upon plaintiff the deposit of money subject to arbitrary forfeitures for failure to observe the rules or orders of an organization of which he was not a member and for failure to observe the unreasonable and illegal conditions imposed upon him."

This, as already explained, shows the qualified character of such refusal as the defendants actually made to deal with the plaintiff, and since, as we have shown, the defendants had an absolute right to refuse to deal with him the qualified exercise of that right was certainly not illegal.

Whitwell v. Continental Tobacco Co., 125
Fed., 454, 460-463 (8th C. C. A., 1903).

- (13) "The refusal of all defendants by virtue of common agreement for the purpose of destroying plaintiff to have any further business dealings with him."

The legality of the defendants' refusal to deal with the plaintiff has already been fully demonstrated and requires no further comment.

Coming now to the authorities relied upon by plaintiff, most of the cases relied upon by plaintiff to establish a restraint of trade will be found under Point II of this brief properly classified so that it may readily be distinguished from the case at bar.

United States v. Swift, 122 Fed., 529; *United States v. Jellicoe Coal Co.*, 46 Fed., 432, are relied upon and have no application because both involved price fixing and other matters which have no connection with the case at bar.

In the effort to distinguish *Mutual Film Corporation v. Ohio*, 236 U. S., 230, and the companion case, *Mutual Film Corporation v. Kansas*, 236 U. S., 247, it was said below:

"The court considered the case as if the facts were that the local exchange distributed films only throughout the one state in which respect the instant case is different."

But an examination of the statement of the case against Ohio, made by the Court, shows the following facts were before the Court in that case:

"In addition to selling films in Ohio complainant has a film exchange in Detroit, Michigan, from which it rents or leases large quantities to exhibitors in the latter state and in Ohio" (p. 233)
 • • • "The business of selling and leasing films from its offices outside of the state of Ohio to purchasers and exhibitors within the state is interstate commerce which will be seriously burdened by the exaction of the fee for censor-

ship which is not properly an inspection tax and the proceeds of which will be largely in excess of the cost of enforcing the statute and will in no event be paid to the Treasury of the United States" (p. 234).

We think this sufficiently shows that the supposed ground of distinction relied upon by plaintiff does not exist.

The differences between the case at bar and the cases cited by plaintiff in an effort to show that the transactions described in the complaint constitute interstate commerce have already been made sufficiently plain.

It may, however, be desirable to say in conclusion that the point to be borne in mind in this case, as to this issue, is that, notwithstanding the undoubted fact that the defendants did originally cause their merchandise to be transported in interstate commerce from beyond the borders of Nebraska into the City of Omaha to their own agents, the interstate shipments and movements came to an end, so far as this plaintiff is concerned, when the films reached Omaha.

Thereafter, even though approval for the making of new contracts, with reference to those films, frequently came from the New York office of the defendants, no interstate shipment or movement of the films was thereby effected. Even though the films could or might be recalled to New York, it does not appear that they were so recalled or that plaintiff would have been in any way affected if they had been.

So likewise, it is utterly immaterial that the films in the Omaha exchange sometimes went from there into Iowa and South Dakota.

They did not go to the plaintiff from Omaha into Iowa or South Dakota and no such allegations are made in the petition.

Thus it is clear that the defendants' refusal to deal with the plaintiff did not and could not have had any

effect whatever upon interstate trade and it is likewise plain that that trade was not in any way, much less, in a direct and in an unreasonable manner restrained, either by anything done or alleged to have been done or omitted by the defendants.

This obvious and simple fact disposes of the case.

It results that no cause of action was alleged against the defendants and the defendants were entitled to judgment in their favor.

POINT IV.

Upon the merits the judgment of the Court below should be affirmed.

Dated, New York, September 10, 1923.

Respectfully submitted,

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